HISTORICAL PAPERS

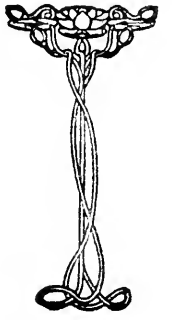
Published by the Trinity College Historical Society

SERIES XVII

DUKE UNIVERSITY PRESS
DURHAM, NORTH CAROLINA
1927

HISTORICAL PAPERS

Published by the Trinity
College Historical Society



SERIES XVII

DUKE UNIVERSITY PRESS
DURHAM, N. C.
1927

THE SEEMAN PRESS
DURHAM, N. C.
1927

THE SUPREME COURT OF NORTH CAROLINA AND SLAVERY

BY

BRYCE R. HOLT

PREFACE

This essay was presented in partial fulfillment of the requirements for the degree of Master of Arts in Duke University in June 1924. Its purpose is to present the decisions of the Supreme Court of North Carolina regarding slavery in the light of the times and the laws under which those decisions were handed down. It does not recite the entire category of the legislative acts concerning slavery nor give an account of the economic and social aspects of slavery in North Carolina, but the general trend in the development of slavery is emphasized in connection with the various cases.

The most valuable studies of work done on the economic, legal, social, and religious aspects of slavery in North Carolina are the chapters by Dr. Wm. K. Boyd, of Duke University, in his *History of North Carolina in the Federal Period,* and Dr. John S. Bassett's *Slavery and Servitude in the Colony of North Carolina, Slavery in North Carolina,* and *Anti-Slavery Leaders of North Carolina.* It is upon these works that I have relied mainly for general information concerning slavery in North Carolina, and it is hoped that this essay may supplement these investigations, and also be of aid to any who may do a similar work for any other of the former slave holding states.

Bryce R. Holt.

Duke University,
May 27, 1926.

CONTENTS

INTRODUCTION

The Revisal of 1715 included the first known legislation in North Carolina on the subject of slavery.[1] As it was a composite, many of its details were beyond a doubt in force much earlier, perhaps as early as 1699, for in that year a law is known to have been in existence which prevented the harboring of runaway slaves, and the provisions of the law are repeated in the Revisal of 1715.[2]

However, the chief interest of the slave law, as contained in the Revisal of 1715, is that it prohibited the trial of a slave in the same court in which freemen were tried. If the offense were of a serious nature the slave was to be tried before any three justices of the peace and three additional freeholders who were also slaveholders, or at least the major part of them, who lived in the precinct wherein the offense was committed. This tribunal was to try the case according to its best judgment, to give sentence, and to order the execution of the sentence by the regular officers of the law. It was to meet at a time to be appointed by the justice of the peace whose name appeared first in the commissions of the justices for the precinct. This would allow the slave to be tried at once, and the master would, therefore, not be deprived of his labor while waiting for the regular court to sit. As a result of the execution of the slave by order of the court, or for his death which might result from an attempt to resist arrest, the court was to ascertain his value and give a certificate of the valuation to the owner. The owner was then entitled to reimbursement for his loss, a poll-tax on all the slaves in the colony being levied for that purpose. Such payments were abolished in 1786 because "many persons by cruel treatment of their slaves cause them to commit crimes for which many of said slaves are executed."[3]

The act of 1715 was in force until 1741 when we find another "Act concerning servants and slaves."[4] By this law the provisions for the trial of slaves were slightly altered. The

[1] *Colonial Records*, II. 62.
[2] *Ibid.*, p. 514.
[3] Laws of 1786, ch. 17.
[4] Laws of 1741, ch. 24.

trial was to be conducted by two justices and four freeholders who were also slaveowners. The jurisdiction of the court was extended under the law of 1715, and we may believe that the law was more liberal, for it was, as we shall later see, in the direct line of securing greater justice for the slaves. This court was directed to "take for evidence the confession of the offender, the oath of one or more creditable witnesses, or such testimony of negroes, mulattoes, or Indians, bond or free, with pregnant circumstances as to them shall seem convincing, without solemnity of jury; and the offender then being found guilty, to pass such judgment upon the offender, according to their discretion as the nature of the offense may require, and on such judgment to award execution." Undoubtedly the words "pregnant circumstances" gave the court an opportunity for a greater degree of freedom in reaching its decisions than the other clauses of the law. This act remained on the statute book until 1793, when the slave received additional security.

By a law of that year the slave was to be tried for offenses involving life, limb, or member before a jury of twelve slaveowners in open county court, but "in a summary way." A special court, however, of three justices of the peace and twelve slaveholding jurymen was to be called by the sheriff in case the county court did not meet in regular order within fifteen days after the arrest of the slave. The master was to be notified and permitted to defend the slave, and in case the slave was found guilty the master paid the costs. If the master were not known, the slave was allowed counsel. The expression "in a summary way," no doubt meant that the case was to be tried with due regard to the conditions of the times and that the court was, therefore, not bound by the ordinary rules of pleading.[5] The expression was defined in 1794. It was then explicitly declared that the jury should render a verdict on the evidence submitted, and that the court should give judgment which agreed with the verdict of the jury and the laws of the country.[6] No doubt the aim of this statute was to insure greater justice to the slave.

[5] Laws of 1793, ch. 5.
[6] Laws of 1794, ch. 11.

Still further protection was guaranteed in 1816[7] when it was enacted that slaves accused of capital crimes should be tried in the Superior Courts under the same rules of procedure as in the trial of freemen, except in cases of conspiracy. The law provided that there must be a presentment by the grand jury, that the owner must be notified, that the privilege of removing the trial to another county on affidavit of the master was to be permitted, and that slaves were to be allowed the benefit of clergy for offenses in which it would be granted to whites. The records of the Superior Court of Richmond County show the application of the benefit of clergy to slaves charged with and found guilty of crimes punishable with death in cases heard in the years 1828 and 1832. By benefit of clergy capital punishment was mitigated to chastisement, twenty to thirty-nine lashes, in clergyable offences.[8] The law also provided that in the case of conspiracy a special session of the Superior Court should act under a commission of the governor.[9] In 1818 a slave on trial for his life was given the full right of a freeman to challenge jurors, and in 1820[10] it was provided that when a slave was convicted of a capital offense the costs should be paid by the county. Apparently in capital offenses the slaves and whites received the same protection.[11]

Minor offenses were also treated more liberally. By the law of 1783 jurisdiction over minor cases—"inferior offenses" —was given to justices of the peace, but many such cases were placed under the jurisdiction of the county courts, "to be tried under the same rules, regulations and restrictions as the trials of freemen." In 1842, however, appeal was allowed to the county or superior courts in all cases in which the justice of the peace acted. The discussion of certain cases will bring this fact out, as it will also show how the life of the slave was better protected.

Though in the above instances the statutes and the interpretations placed on them by the courts were very liberal, the trend of

[7] Laws of 1816, ch. 14.
[8] *Journal of Negro History*, October, 1923; "Documents and Comments on Benefit of Clergy as Applied to Slaves."
[9] Revision of 1821, ch. 172.
[10] *Ibid.*, ch. 1073.
[11] Boyd, *History of North Carolina in the Federal Period*, p. 213.

the law concerning slavery as an institution was toward greater severity. Especially were the laws more severe after 1831. It does not seem that these laws were enacted because of any deliberate cruelty on the part of slave owners, for there were enough humane laws and customs throughout the period of the first half of the nineteenth century to prove the contrary; rather they were inspired by a fear of racial friction and a reaction against abolitionism.[12] Though the laws governing slavery as an institution became more severe, a study of the decisions of the Supreme Court reveals the fact that the rights of slaves as individuals were more strictly guarded under the liberal laws protecting their personal rights. In 1834 the case of *State vs. Will,* which will be taken up later, brings this point to the surface. Before this case decided the right of a slave to resist his master, four cases were brought before the Court in which white men were tried for the killing of slaves. Two so indicted were freed by the Court, one was declared guilty of manslaughter, and the fourth was found guilty of murder. After this case, in which a liberal decision was given, there were two cases in which whites were charged with the murder of slaves, and in both cases the defendants were found guilty of murder. There were three cases in which the killing was done by slaves, and while one was found guilty of murder, two were found guilty of manslaughter. These decisions, rendered at the time when the pro-slavery sentiment was in the flush of victory over the conservatives and when the manumission societies had disappeared and the laws were becoming more strict, tend to show that the right of the slave as a human being would receive the protection of the judiciary. Believing a court to be more conservative than a legislative body, we find as a fact that which we should expect to be true. However, the Court was not so liberal with regard to the institution of slavery. For instance, the Court was very strict in cases of manumission, while it was liberal in the cases of suits for freedom. The penalties placed on the whites by the courts because of their unlawful dealings with slaves were in strict conformity with the statutes, because such dealings weakened the bonds of

[12] See Bassett's *Slavery in the State of North Carolina,* p. 317.

slavery. Here the judiciary was on its guard to prevent slaves from being held in a quasi-state of bondage.

While the codes of Virginia and South Carolina provided that slaves were to be held as personal property, the code of North Carolina did not so provide. It seems, however, that they were treated as personal property, as they could be sold for the execution of a debt and would not pass to a legatee under the same rules that real estate passed. While by the old Roman law they were held only as real property, it seems that they could be considered either as real or personal property in the United States. "It is true," says Wheeler in his *Law of Slavery,* "by the positive law of this country, slaves are declared to be real estate; but by the same law, there are to that rule so many exceptions that they may, in common parlance, and by common intent be sufficiently described as personal estate."[13] So it was evidently left to each state legislature to declare if slaves were to be personal or real property. Though the legislature of North Carolina was silent on the matter, by custom they were generally regarded as personal property.

That the Court recognized slaves as personalty is shown by actions brought by masters for the recovery of stolen or wrongfully detained slaves. Actions of trover and detinue were the actions brought and these were, of course, actions relating only to personal property. Likewise in proceedings for partition it is clearly shown that slaves were treated as personalty.[14]

With this general background as to the method of the trial of slaves and the general trend of the interpretation of the law governing slavery, let us consider the cases as they came before the Supreme Court and the acts under which they were decided.

[13] Wheeler, *Laws of Slavery,* p. 37.

[14] 55 N. C. Reports, 230, for example. Here other cases are cited.

I

Offenses Against the Person of Slaves

Of the various classes of cases concerning slavery which were brought before the Supreme Court of North Carolina, none are more interesting than those concerning the slave's right to life. It is in these cases that we should expect to see the attitude of some of the leading judges toward slavery brought out most clearly, and we are desirous of seeing how closely the Supreme Court adhered to the "first law of North Carolina" in regard to slavery. That law was a clause in the Fundamental Constitutions and ran as follows: "Every freeman of North Carolina shall have absolute power and authority over negro slaves of what opinion and religion soever."[1] This principle raised the question whether procedure for offenses against slaves was limited to that of the statutes, or whether the common law was also to apply. Another interesting question brought out was that of legal provocation; that is, would a provocation sufficient to excuse a white man of some act, be sufficient to excuse a slave? Just how such questions were dealt with I will point out in the cases which are to follow.

The first case we have to consider is that of *State vs. Boon,* decided in 1801. The prisoner was indicted on the third section of the law of 1791 which states "that if any person shall be guilty of wilfully and maliciously killing a slave, such offender upon conviction thereof shall be adjudged guilty of murder and shall suffer the same punishment as if he had killed a free man." At the December term of court held in Hillsborough, the jury found the prisoner guilty, but his counsel filed several exceptions, and an appeal was taken to the Court of Conference.[2]

In rendering the opinion of the Court, Justice Hall pointed out that the act of 1774 made the punishment of the malicious and wilful killing of a slave one year's imprisonment for the first conviction thereof, and death for the second conviction. Then he recites the words of the act of 1791, "that if any person shall

[1] *Colonial Records,* I. 204.

[2] There was really no tribunal of appeals distinct from the Superior Courts until 1818. For the antecedents of the Supreme Court and also its history, see the sketch by Battle, 103 N. C. Reports.

wilfully and maliciously kill a slave, . . . he shall suffer the same punishment as if he *killed a free man.*" His conclusion from these words was that they did not mean the same as if they had been "*wilfully and maliciously* killed a free man," and in making his position stronger, he adds that "penal statutes should be construed strictly," and, therefore, the words "wilfully and maliciously" could not be supplied by the Court. In considering the case under common law rules, he declared that if the malicious and wilful killing of a slave were a felony at common law under any circumstances which, in the case of a free man, would amount to a felony, the punishment due was greater than that inflicted by the act of 1774; and since the act of 1791 intended the punishment of death, the same purpose would have been obtained by repealing the act of 1774. In conclusion he says: "It is doubtful whether the offense with which he is charged is a felony at common law or not. If it is doubtful whether he should be punished or not, that certainly is a sufficient reason for discharging." In this last utterance Hall was acting according to the regular rules and principles of the Court, as he was when he declared that penal statutes should be construed strictly, for when the Court is acting under an act of assembly and the act admits of two constructions that must be adopted which is favorable to the prisoner.

Justice Johnson believed that "It is the evidence of a most depraved and cruel disposition to murder one who is so much in your power that he is incapable of making resistance, even in defense of himself." Still he could not be of an opinion different from that of Hall; the words "shall suffer the same punishment as if he had killed a free man," contained in the act of 1791, would not apply to the killing of a slave because there were different degrees of homicide in the case of a free man. Justice McKay concurred in this opinion.

There was no doubt, however, in the mind of Justice Taylor that this case came under the common law definition of murder, which was "the unlawful killing of a *reasonable* creature, within the peace of the State with malice aforethought." He made his position stronger by declaring that it could not be inferred from the act of 1774 that the legislature "doubted that this amounted to murder at common law," but was doubtful as to

punishment—a thing which did not affect the guilt. This conclusion was deduced from Blackstone, who said, "Human laws do not increase . . . moral guilt." It would seem that Taylor was treading on different ground than that covered by Hall. Taylor in concluding held that since the Statutes of 23 Hen. 8 and 1. Ed. 6 deprived crimes coming under this definition of the benefit of clergy, and since, in his opinion, the act of 1791 repealed that of 1774, and therefore reviving the statute by which murder is deprived of clergy, it would call for judgment of death on the prisoner if it only had been explicit enough in its terms. The Court ordered the judgment of the lower court arrested solely because the act was not explicit enough in its terms to convict the prisoner of murder. In this decision of Justices Hall and Taylor, Justices McKay and Johnston concurred.

In reviewing this case one may feel that a person guilty of "maliciously and wilfully" killing a slave should have been punished by death. Under the existing laws, however, it seems that the Court was justified in arresting the judgment of the lower tribunal, for there was a variance of opinion on the bench and among the most able lawyers as to whether the killing of slaves came under the common law definition of murder. The case clearly showed the great need for fixing a penalty for homicide distinct from that for murder. This need was realized by the passage of the act of 1817, which had for its purpose the fixing of a definite punishment for the killing of a slave by making the homicide of a slave extentuated by a legal provocation, manslaughter. While this act left room for discrepancies in determining a "legal provocation," it was better than giving the slayer practical immunity because he could not be convicted of murder, as was possible under the older acts.

The case of *State vs. Tackett*[3] for the murder of a slave, Daniel, brought a very interesting decision in connection with the act of 1817, and was the first case to be decided by the Supreme Court under that statute. The case came before Judge Daniel at the December term of Superior Court of Wake County in 1820 and a verdict of guilty of murder was

[3] 1 Hawks 210.

rendered, from which the defendant appealed, because "proper evidence had been rejected, and because the Court erred in its charge to the jury." In brief, the evidence showed that the defendant and the deceased had threatened the life of each other in times past and had once engaged in a fight; further, that the prisoner was a drunkard and had "kept" the wife of the deceased. Evidence was also given to show that the slave was "turbulent, insolent, and impudent." As to the killing, the evidence of the prisoner was that on returning at night from down town (the town being Raleigh), he found the deceased lying on the ground looking in the window of the house of one Richardson with whom the prisoner lived and on whose lot the deceased lived, that he talked with the slave a while and then went into the house, got his gun, returned, and shot him.

The opinion of the Supreme Court was delivered by Chief Justice Taylor. In it these words are found: "many acts will extenuate the homicide of a slave, which would not constitute a legal provocation if done by a white person." He did not believe that such acts could be defined so as to apply to every case in which this question might be involved, but that the court and jury should estimate these acts in individual cases, with due regard to the rights of each party—"to the just claims of humanity, and to the supreme law, and the safety of the citizens." In conclusion, he stated that, in general, the rule should be laid down that words are not, but blows are, a sufficient provocation to lessen the crime of homicide to manslaughter, and the prisoner was entitled to a new trial. He thought the jury should determine the circumstances under which a homicide would be manslaughter. Between whites this would have been murder, for words will not extenuate and neither will past blows. The defendant was granted a new trial.

In 1823, on an appeal from the Superior Court of Hertford County, where the prisoner was found guilty of the murder of a slave at common law, the Supreme Court, in the case of *State vs. Reed,*[4] declared that the killing of a slave might be tried under the common law rule. In this view Chief Justice

[4] 2 Hawks 454.

Taylor and Justice Henderson acquiesced, but Justice Hall dissented, holding as he did in *State vs. Boon*. The decision was, in the words of Taylor, "founded upon the laws of nature and confirmed by revelation." He also held that by the passage of the act of 1817 the case would be subject to the Court's jurisdiction, referring to his opinion in the two cases which I have just reviewed.

In the opinion of Justice Henderson we find the very substantial statement that the law of slavery gave the master the control of the service of the slave and that the Court would not be too scrupulous in adjusting the means of enforcing that service. "But the *life* of a slave being in no way necessary to be placed in the powers of the owner for the full enjoyment of his services the law takes care of that; and with me it has no weight to show that by the laws of ancient Rome or modern Turkey, an absolute power is given to the master over the *life* of his slave. I answer, these are not the laws of our country, nor the code from which they were taken. It is abhorrent to the hearts of all those who have felt the influence of the mild precepts of Christianity." This was a new interpretation placed on the so-called "first law of North Carolina"[5] in which it was held that the power of the master was absolute, and the importance of the interpretation is that it became the prevailing rule of the Court. This interpretation was indirectly opposed to the opinion of Justice Hall, who held that the slave is a chattel. Following the line of reasoning which he had outlined in the case of *State vs. Boon*, he held that if a slayer was subject to an action for trespass by the master of the slave and was also guilty of murder at common law, he would be answerable both *civiliter* and *criminaliter*, and the Legislature could not have intended to create such a condition.

The next case to come before the Court was that of *State vs. Hale*,[6] which was sent up from the Superior Court of Cumberland County in 1823. The question at issue was the degree of guilt of a white man charged with "cruelly, and inhumanly beating and wounding" a slave. It was held that a battery

[5] Bassett, *Slavery and Servitude*, p. 27.
[6] 2 Hawks 582.

committed on a slave was an indictable offense, no justifying circumstances being shown. I cannot make this decision stand out more clearly in its exact meaning than to repeat the words of Chief Justice Taylor: "It is undeniable that such offenses must be considered with a view to the actual condition of society, and the difference between the white man and the slave, securing the first from injury and insult and the other from needless violence and outrage." He casts a clear light on a most deplorable phase of slavery when he further states that such offenses were usually committed by "men hanging loose on society," being repelled from the association of well-disposed citizens and taking up company with colored persons and slaves with the idea that they can beat a slave because he "dare not resent the blow of a white man." In this opinion Justices Hall and Henderson concurred. After noting the position taken by Hall in the cases preceding this, it is gratifying to note the seeming difference in his attitude. This principle was applied to others than the master, however, and we are to see in the case following that it was applied to the assault of a master on his slave.

In the case of *State vs. Mann*,[7] tried in 1829, the defendant was found guilty of an assault and battery "on a slave, Lydia, who had been hired to him for a period of one year." The case was tried before Judge Daniel at the Superior Court of Chowan County. The evidence showed that while the defendant was attempting to chastise the slave, Lydia, for some small offense, she ran, and on refusing to stop at his command to halt, he shot and wounded her. When the case came before the Supreme Court, on an appeal by the defendant, it was decided that a master was not to be indicted for a battery committed by him on his slave, nor was the hirer of a slave liable to indictment for a battery committed by him on a slave while in his hire, but that the owner has the right to damages for an injury affecting the value of a slave. So, in this case, as well as all other cases where the hirer or overseer was involved, it was held that he who has the right to the services of a slave has the right to all the means of controlling his conduct that

[7] 2 Devereux 263.

belong to the master or owner. The decision was given by Justice Ruffin. His grounds for such a view were that there had been no prosecutions of masters for such offenses, and against this general opinion of the community the Court should not hold. He believed it erroneously said that the relation between the slave and his master was like that between a child and parent, for it was always held unlawful for a parent to commit a battery on his own child. The object of the parent and that of the master were of an entirely different nature as regarded their position over their subordinates, for the object of the training of a child was the life of a freeman, and moral and intellectual instruction was the means to be used. With slavery it was very different. Continuing, he said: "The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person and his posterity to live without knowledge and without the capacity to make anything his own, and to toil that another may reap his own fruits. What moral considerations shall be addressed to such a being to convince him that it is impossible but that the most stupid must feel and know can never be true—that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness. Such services can only be expected from one who has no will of his own, who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. The power of the master must be absolute to render the submission of the slave perfect. I most heartedly confess my sense of the harshness of this proposition. I feel it as deeply as any man can; and as a principle of moral right every person in his retirement must repudiate it. But in the actual conditions of things it must be so. There is no remedy. This discipline belongs to the state of slavery. . . . The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man if not by the laws of God." It was not in the power of the courts to fix the punishments due to the violations of duty by the slave. "No person can anticipate the many and aggravated provocations of the master to which

the slave would be constantly stimulated by his own passions or the instigations of others to give, or the consequent wrath of the master prompting him to bloody vengeance upon the turbulent traitor—a vengeance generally practiced with impunity because of its privacy." This case is one that might be called a pure case of "slave law," for such acts of enforcing labor cannot be supported by the general law of the land.

Such a decision, if it had really shaped the law, would have been a means of checking the growth of the humanitarian spirit manifest in the earlier statutes. But the mind of Justice Ruffin was not a closed mind; a later decision by him was quite different in spirit. Before considering it, let us notice another case that is really a landmark in the development of judicial construction regarding the rights of the slave.

In this case another of the great jurists of the State gave the decision of the Court, which established the distinctly milder principle that a slave who was barbarously attacked might defend himself with physical force. This case, which is a credit to Justice Gaston and to North Carolina, is that of *State vs. Will,*[8] tried in 1834. In brief the circumstances of the case were as follows: Will, a slave, became enraged because another slave was permitted to use a hoe which he had been accustomed to use. In his anger he broke the handle and went to work. The overseer was notified of the act, whereupon he took his gun and rode to the place at which Will was at work. He called to him the slave, who approached in an humble manner, holding his hat in his hand. A few words were exchanged, when Will began to run. The overseer then fired, making a very painful wound in the slave's back, one which might have proved fatal. The terrified slave was pursued by the overseer and two other slaves, and at the end of about eight minutes' time he was caught. In a struggle to loose himself from their hold, he cut the overseer with a pocket knife so that he bled to death. All the circumstances showed that Will in his frightened condition acted in supposed self-defense. Such were the facts found in the special verdict by the jury which heard the case before Judge Donnell in Edgecombe County. Upon such finding of

[8] 1 Dev. & Bat. 121.

facts the Judge declared the prisoner guilty of murder and pronounced the sentence of death, whereupon an appeal was taken. His plea, then, was manslaughter. His leading counsel was B. F. Moore,[9] then young and unknown, but later one of the leading lawyers of the state. Of course Mr. Moore was confronted with the opinion of Justice Ruffin in the case of *State vs. Mann.* He therefore quoted Judge Henderson's opinion in the case of *State vs. Reed* to show that the master's powers extended only to the services of the slave, and thus challenged the conclusions of Justice Ruffin. Indeed, he declared they were not only "abhorrent and startling to humanity, but at variance with statute and decided cases." Point by point this young lawyer met the opinion of the learned judge in so far as it related to the relation of the master and slave. One of his eloquent passages will indicate the nature of his attack. Justice Ruffin had said that in no instance could the master's power be usurped, and that the slave must be made sensible to this fact. Mr. Moore declared that this thought reduces the instinct of self-preservation into perfect tameness, a thing very difficult to accomplish, and a result to be regretted if accomplished. But if the condition of slavery demanded "that the slave be disrobed of the essential features that distinguish him from a brute, the relation must adapt itself to the consequences and leave its subjects the instinctive privileges of a brute. I am arguing no question of abstract right, but am endeavoring to prove that the natural incidents of slavery must be borne with because they are inherent to the condition of slavery itself; and that any attempt to punish the slave for the exercise of a right which even absolute power cannot destroy is inhuman and without the slightest benefit to the security of the master or to that of society at large. The doctrine may be advanced from the bench, enacted by the legislature, and enforced with all the varied agony of torture, and still the slave cannot believe that there is no instance in which the master's power is usurped. Nature, stronger than all, will discover many instances and vindicate her rights at any and at every price. When such a stimulant as this urges the for-

[9] "Case of the State vs. Will," *Papers of the Trinity College Historical Society.* Series II., p. 12. Here a full discussion of the case of *State vs. Will* is found.

bidden deed, punishment will be powerless to proclaim or to warn by example. It can serve no purpose but to gratify the revengeful feelings of one class of people and to influence the hidden animosities of the other." If we believe that laws are not made but that they grow out of some need as the result of existing conditions, we must realize the force of this argument.

The decision was written by Justice Gaston, and he showed himself a very humane judge when he said: "Unconditional submission is, in general, the duty of the slave, unquestioned legal power is, in general, the right of the master. Unquestionably there are exceptions to this rule. It is certain that the master has not the right to slay his slave, and I hold it to be equally certain that the slave has the right to defend himself against the unlawful attempt of his master to deprive him of life. There may be other exceptions, but in a matter so full of difficulties, where reason and humanity plead with almost irresistible force on one side, and a necessary policy, rigorous indeed, but inseparable from slavery, urges on the other, I fear to err should I undertake to define them." Like Justice Ruffin, Justice Gaston would not define legal provocation, but he did say that a slave's unlawful violence excited by his master's inhumanity ought not to be construed as malice. "The prisoner," said the Court, "is a human being degraded by slavery, but yet having organs, senses, dimensions, passions, like our own." No malice was shown in the evidence, and the killing was pronounced manslaughter. The case was a notable one, and it served as a notice to all that the life of the slave would be protected by the Court. The decision, then, must have raised the status of the slave in the eyes of all well-disposed citizens, at least.

In an address two years before the case was brought to the Court, Justice Gaston had said: "Disguise the truth as you may, and throw the blame where we will, it is slavery which, more than any other cause, keeps us back in the career of improvement."[10] He was of the Catholic faith, yet he was

[10] Address before the Dialectic and Philanthropic Societies at Chapel Hill, N. C., June 20, 1832, p. 24.

not debarred from holding office in the state, as the Constitution apparently meant that a Catholic should be, for "his character and great service raised him above partisan prejudice."[11] Belonging to a minority faith, he probably defended more minority causes than any man of his day. In 1867 Governor Swain made the following remark of the noted jurist: "He was one of the purest as well as the wisest men I have ever known."[12]

In 1839 it is plainly seen that the decision in the *State vs. Will* had a lasting effect. In that year the Court had before it the case of *State vs. Hoover*.[13] The evidence was that the master of a slave, Mira, inflicted on her a series of the most brutal and barbarous whippings, and also privations, for a period of four months, during which time the slave was ill. Independent of head wounds, which proved to be fatal, there were five wounds on other parts of the body sufficient to produce death; to these the doctor called to examine the body by the coroner testified. The prisoner offered no testimony before the Superior Court of Iredell where the trial was held, with Judge Dick presiding. On the jury's finding the prisoner guilty of murder, he appealed to the Supreme Court. The Court held that when a slave died from moderate chastisement by his master, every circumstance which in the general course of slavery might have moved the master to excess would be tenderly regarded. But when the punishment was of a nature which denote plainly that the master must have contemplated a fatal termination to his barbarous cruelties, and death ensued, he is guilty of murder. The opinion was delivered by Justice Ruffin, who further stated that "the master's authority is not altogether unlimited," while in the case of the *State vs. Mann*, it is remembered, he had held that "the power of the master must be absolute to render the submission of the slave perfect." At this time, when the pro-slavery sentiment was growing stronger, such a decision must have been due to the precedent of the case of *State vs. Will*, as well as to the brutality of the circumstances. It may be believed, also, that the word *absolute*, as

[11] Boyd, *History of North Carolina in the Federal Period*, p. 70.
[12] *Great American Lawyers*, III. 16.
[13] 4 Dev. & Bat. 500.

used in the case of *State vs. Mann* by Justice Ruffin, was not used so as to convey the idea of the right of the master to take the life of a slave, but the right to inflict any corporal punishment short of death. Also, in *State vs. Mann* the master was attempting to prevent the escape of the slave and Justice Ruffin realized the need of the aid of the Court in upholding the power of the master as a means of protecting the institution of slavery; but here the personal rights of a slave was the question. However this may be, we find this decision a more humane one than that given ten years previously.

In 1855, in the case of *State vs. Robbins*, the decision of the Court gave added protection to the slave by declaring that if a master, in correcting a slave for a slight offense, kill him by the cruel use of a deadly weapon, he would be guilty of murder, if there was no legal provocation. In brief, these are the facts which the evidence showed, as given before Judge Bailey, presiding at the December term of the Superior Court of Wilkes County.[14] The prisoner, with an axe in his hand, was chasing his Negro slave, who was about sixty years of age, around the woodpile and beating him with the handle of the axe as the Negro ran. The Negro was heard to say, "You will kill me"; and the prisoner replied by saying that he intended to kill him, cursing him at the time, and afterwards asking him why he had not fed the horse as he had been told to do. The slave replied that he had, and then ran into the kitchen where the defendant pursued him, leaving the axe on the outside; there he knocked the slave to the floor and proceeded to stamp upon him and to beat him with the butt end of a wagon whip, continuing this punishment until he became exhausted. He then poured hot water over the body and head of the Negro and beat salt into his back with a whip. From the effect of this punishment, the slave died about one o'clock the following morning, the punishment having been begun "between sundown and dark" and lasting till "nine or ten" o'clock. About four o'clock in the morning the defendant placed the body under the floor of the Negro's cabin. The evidence was given by a seventeen year old step-daughter and substantiated by her two

[14] 3 Jones 249.

younger sisters. The jury found the prisoner guilty of murder. The defendant appealed because the judge did not charge the jury as to the effects of a legal provocation in a case of this nature. In giving the opinion of the Court Justice Battle said: "We are at a loss to comprehend how it (this case) could have been submitted to the jury, that they might find an extenuation from provocation," because no provocation appeared. The master had a right to chastise the slave if he had not fed the horse, but the punishment inflicted by a deadly weapon was unlawful. The cases of *State vs. Will* and *State vs. Hoover* were cited.

Have we not a right to believe that a greater number of such brutal acts would have taken place had the Courts not adopted the policy of more closely guarding the life of the slave? Though in a few instances the Court "stuck in the bark" in applying the law to acts committed on the person of slaves, the foregoing cases as a whole clearly show how the Court protected their personal rights as those of human beings and not as "doomed to uncontrolled authority of the body." The masters were protected in their right to keep the slave in subjection, but neither they nor third parties were protected in wanton and malicious cruelties committed on slaves.

II

OFFENSES BY SLAVES

A. The Killing of White Men

The first case to be mentioned in which a slave was tried for the killing of a white man is that of *State vs. Jarrott*,[1] brought before the Supreme Court in 1840. The evidence given by a white boy, Brooks, was that he had gone with the deceased, who was eighteen or nineteen years of age, to a fish trap where several Negroes were collected. The prisoner and another Negro, differing over a game of cards, asked the deceased to keep the game for them, which he did till a second difference arose. Then the prisoner and his partner discontinued the game. In getting up from the game the prisoner lost a coin in the leaves; thereupon he said that his "nine pence piece walked into a white man's pocket," and also remarked that the deceased had been

[1] 1 Ired. 76.

raised on stolen meat. He accused the deceased of stealing the money and told him he would kill him if he did not give it up. The deceased proved to him that he did not have the money, which was later found among the leaves. The prisoner, however, continued to use insulting language till the deceased secured the knife of the witness and told the prisoner that he would stick it in him if he did not "shut up." When the prisoner dared him to do it, the deceased with the open knife and a fence rail—the knife having a blade about three inches long and the rail being about the length of a man's arm—ran the Negro off, but the slave soon returned. Then a second exchange of words took place, and the deceased was struck with a stick of curly hickory, about the size of a walking cane, large at the butt end. The evidence was not clear as to who renewed the quarrel on the return of the Negro, for at this point the Negro witnesses differed from the white witnesses. The effect of the blow by the Negro produced the death of the deceased. The jury of the June term of Superior Court of Person County found the Negro guilty of murder, and Judge Dick pronounced the sentence of death, whereupon an appeal was taken.

Justice Gaston, in giving the opinion of the Court, expressed many of the principles which he had laid down in the case of *State vs. Will.* He also declared that the difference between homicide through passion and homicide through malice was to hold as much in the trial of a slave as in the trial of a white man; but that the same matters which would be deemed a sufficient provocation for whites would not be such for slaves. Some words of a slave might be so aggravating as to arouse the temporary anger which destroys the charge of malice, and the rule would hold good regardless of the personal merits or demerits of a white man. The insolence of a slave would justify a white man in giving him moderate chastisement at the moment, but would not be a cause for excessive battery, or moderate correction after the insolence was past. When two parties become enraged and fight on equal terms until one is killed by the other, the crime is manslaughter; but this rule applies only to equals and not to slaves, it being the business of the slave to avoid such a contest. This idea goes back to the fact that the slave was regarded as not capable of feeling. If,

however, a battery endangers the slave's life, it will reduce homicide to manslaughter. The Justice thought that the weapon used by the prisoner was not of a deadly character and, therefore, left no room for the question of malice on his part, or cruelty, as would manifest a "thoroughly wicked heart." The judgment of the lower court was reversed, and a new trial was directed. Surely so humane an opinion as this must have relieved the Negro of a great deal of punishment which was so liable to be inflicted on him by those whites "hanging loose on society."

The next case to be considered also shows a liberal spirit. It is the case of *State vs. Caesar*,[2] tried before Judge Dick at the June term of the Superior Court of Martin County in 1849. The evidence, in brief, was as follows: two white men, Mizell and Brickhouse, having "drunk spirits," came across two Negroes, lying in an old field. The time was in the early part of the night. They asked the Negroes if they did not know they were patrollers, gave them "two or three light licks," then walked off a distance, but returned when they heard Dick, one of the Negroes, laugh. Charles, another Negro, having heard the conversation, came up, and the white men began to beat the three. The prisoner swore to Charles that he would not stand the beating, and proceeded to get a rail from a nearby fence and struck the deceased, Mizell, on the head, the blow proving fatal. The prisoner appealed from the sentence of death.

The opinion of the Court was delivered by Justices Pearson and Nash, and Chief Justice Ruffin. Justice Pearson held that if all parties had been white men, it would have been manslaughter; but a provocation which would "dethrone reason for a time," if given by one white man to another, should not do so when given to a slave by a white man, referring to the case of *State vs. Tackett*. The difference is that in the case of a blow between two white men there is a sense of degradation, while in the case of the slave only bodily pain is suffered. Yet, he believed, as was decided in the case of the *State vs. Hale*, that the blows in this case amounted to a legal provocation. He continues thus: "Are we not forced in spite of stern policy

[2] 9 Ired. 391.

to admire even in a slave the generosity which incurs danger, to save a friend?" This was said because the prisoner struck the fatal blow while Dick was being beaten. "The law requires a slave to tame down his feelings to suit his lowly conditions, but it would be savage to allow him under no circumstances to yield to a generous impulse."

Justice Nash proved to his own mind that a new trial should be granted by holding to some of the important preceding cases. Though by law a slave might not be considered as one feeling the degradation of a blow, a blow which threatened great bodily harm amounted to a legal provocation (*State vs. Will*), and the action of drunken men was, he believed, sufficient to arouse such fear. As to the prisoner's aiding a friend, he would be guided by Justice Taylor's opinion in the Hale case, when he held that it was hard to draw the line in determining with precision a legal provocation for battery by a white man on a slave, and, as was stated in the Tackett case, the circumstances should be judged by the court and jury "with a due regard to the habits and feelings of society." He agreed with Justice Gaston, who had said in the case of *State vs. Will,* "Unless I see my way clear as a sunbeam, I cannot believe that this is the law." Justice Nash believed that in reality a slave did suffer degradation and would act as a result of passion as well as a result of malice.

Chief Justice Ruffin went over the well covered ground of the principle that an act which would be sufficient to amount to a provocation in the case of a white man would not be sufficient in the case of a slave. He insisted that in this case there was no legal provocation, as there was no danger of great bodily harm from a deadly weapon, as was held to be necessary in the case of Jarrott; therefore, the prisoner must have killed the deceased from malice. Such a conclusion he held to be necessary in order to protect the white race. "It is not a question," he said, "of whether these things are naturally right, and proper to exist (meaning the conditions of slavery). They do exist actually and legally." While he considered there was a legal provocation in the case of *State vs. Will,* he did not believe that the licks of these white men with a rattan and their

fists, with attending circumstances, amounted to a legal provocation. He also held that the slaves could have escaped the so-called "patrollers." Here we have the opinion of three Justices of note, and all were guided by the dictates of their well trained minds. Two stand out boldly for a stronger protection for the slave, while the other stands out just as boldly for the privilege of the white man.

The last case in which a slave was charged with the killing of a white man was that of the *State vs. David*,[3] tried before Judge Manly at the Spring term of Court of Pitt County in 1857. One Bell testified for the State that he and his father arrived at the plantation about dark, and on seeing a negro boy ride off on a horse they mentioned it to the overseer, who went to the house of a slave, Fannie, to inquire about the boy. David, the husband of Fannie, came out into the yard, followed by Fannie, who informed the overseer that she had sent the boy after an old woman, and on being told by him that she should have asked permission for the boy to take the trip, she replied that she had been allowed by her master to do such, and that she would continue to do so as long as she lived on that plantation. The overseer then said that he suspected the errand was for a jug of liquor, and she replied that it was a very big jug, as he would see when it came. Whereupon he took a piece of rope from his pocket and threatened to whip the Negress, who refused to cross her hands, declaring that he should not chastise her that night. The overseer then told her he would knock her down if she refused to fold her hands for the whipping, and struck her with a stick. At this time David approached, and when the overseer turned and struck him, Fannie, with a "pine knot" or "a light stick of wood," struck the overseer a blow which proved fatal. About the time of this blow and that of the overseer, David was seen with the handle of a maul in his hand. One other witness substantiated the evidence. The prisoner offered no evidence. The counsel for the defense excepted to the charge to the jury and appealed from a verdict of murder.

Justice Pearson held that the circumstances tended to show a preconceived purpose on the part of both slaves to resist the

[3] 4 Jones 353.

overseer, and that it must be assumed David intended to assist Fannie "to do it with violence if need be, reckless of the consequence." And an intention accompanied by the *overt act* of advancing upon the deceased brought the guilt of murder upon the prisoner. The act, he held, of drawing the attention of the deceased was equivalent to holding the arms of the deceased for the slave Fannie to strike him. In concluding he held that the unconditional submission of a slave must be exacted. This opinion seems harsh to one at the present time, but it seems there were no grounds upon which the homicide could have been mitigated to manslaughter, for the overseer had acted within the bounds of the law and had a right to subject the slave to chastisement. This fact was well realized by all. The case clearly shows the difference in the legal effect of blows by a master or overseer and those of a third party.

B. Rape[4]

These cases are of particular interest because of the Justices who decided on the three cases brought before the Supreme Court. They were Justices Ruffin, Pearson and Nash. In one of the cases it was held that the word "person" in the statute punishing rape was applicable to slaves as well as to whites,[5] because it was plain that the preceding sections of the act meant to include all classes.[6] This is significant because the Court, in the case of *State vs. Tom*,[7] had declared that the word "person" did not apply to a slave. It would seem inconsistent to treat a slave as a chattel and then punish him at law by acts which governed the whites. It was also held that an indictment under the act of 1823[8] which made an assault by a person of color upon a white female with intent to commit a rape a capital offense, must charge the assault to have been felonious. Charging an assault with intent "felonously to ravish" was held not sufficient; and a crime thus created was a felony, for all capital

[4] The commission of rape by a slave was, of course, a capital offense. The three cases of rape to come before the court were *State v. Jesse*, 1837 (2 Dev. & Bat. 297), *State v. Elich*, 1850 (7 Jones 68), and *State v. Peter*, 1860 (8 Jones 19).

[5] Rev. Code, ch. 34, sec. 5.

[6] 8 Jones 19.

[7] Bushee, 214.

[8] Taylor's Rev., ch. 1129.

crimes are felonies, although statutes creating them may not use the term.[9] In each case the law seems to have been applied without prejudice.

C. Hiring Out Time

The cases coming under this heading were brought before the Court after the year 1823 and by a strict adherence to the statutes they reveal a danger which the public feared in allowing slaves to go at large and in becoming prosperous by hiring out their time.

In 1824 the case of *State vs. Woodman*[10] was brought before the Supreme Court after both the County and Superior Courts had found the defendant guilty of hiring out his own time. Chief Justice Taylor, in giving the opinion of the Court, held that under the act of 1794, which forbade masters to allow slaves to hire out their time, the defendant was guilty and should serve the judgment pronounced on him by the Superior Court, which was that the slave should be hired out by the sheriff for one year, taking bond and security for the hire, the money received to be paid to the wardens of the poor. Though he recognized that it would be taking the service of the slave from his master after the act of the slave was at an end, this was justified because the master held the slave *cum onere*. The strictness with which this case was decided was no doubt due to the fact that it was considered unwise to allow the slave to become prosperous enough to "horde up" money, over and above that which was paid his master for permitting him to hire out his own time. As time went on the legislature became more strict in this matter, for too many Negroes were possessing sufficient wealth to buy their time. This fact will be brought out in the discussion of the cases concerning the master's liabilities for contracts of slaves and those concerning the trading with slaves. Quasi-slavery was also claimed to be the result of hiring out the time of a slave.

In the case of *State vs. Clarissa*,[11] Judge Pearson in the Superior Court of Pasquotank County in 1842 had pronounced sentence on the woman Clarissa, under an indictment or pre-

[9] 2 Dev. & Bat. 297, also 7 Jones 68.
[10] 3 Hawks 384.
[11] 5 Ired. 221.

sentment of the grand jury of Pasquotank County under the 31st section, chapter III of the Revised Code, act of 1831, which prohibited a master from hiring to slaves their own time. In 1844 Justice Nash held that the indictment was defective and should be quashed because it failed to charge that the defendant was allowed by her master to go at large, an overt act contrary to the statute. Under the thirty-first section of the act which prohibited the master from hiring slaves their own time, the master was subject to a penalty of $40; and the slave was only punishable under the thirty-second section of the act for "going at large." It was further held that the act of 1831 did not repeal that of 1794, because the statutes were passed for different purposes—to check the habit of letting slaves go at large was the only object of the act of 1831. This was a case in which the slave was guilty, but the wording of the indictment gave freedom.

It is not surprising to see the indictment in the next case worded "for unlawfully going at large by permission of the master and hiring out his own time." This was the case of *State vs. Nat,*[12] brought before the Supreme Court in 1851. In this case, as in that preceding, Justice Nash held that under the thirty-first section of the act of 1831 neither master or slave was indictable, the master being subject only to a fine of $40, but that under the thirty-second section the master was indictable for allowing the slave to go at large in the employment of his own time. On the matter of the jurisdiction of the Superior Court in cases coming under the thirty-first section of the act of 1831, Justice Nash reversed the opinion which he held in the case of the *State vs. Clarissa,* by saying that the Superior Court does not have jurisdiction over such cases. He was at a loss to account for this portion of his opinion in the preceding case, for it was manifestly wrong, but he declared that he felt it no embarrassment, but a duty, to retrace his steps when apprised of an error.

D. Minor Offenses

In the cases coming under this division the Court was strict in upholding the statutes which determined its jurisdiction, whether the appeals were by the State or by the defendant.

[12] 13 Ired. 157.

In the case of *State vs. Ben,*[13] tried before Judge Badger, presiding at the December term of the Superior Court of Craven County in 1821, there was positive proof of burglary by a white witness, but the only evidence given to show any agency therein on the part of the slave was by another slave, who gave "direct and positive" evidence. The counsel for the defense excepted to the charge of the jury, in which the judge failed to charge that the evidence was insufficient to convict the prisoner because it was not supported by "pregnant circumstances," which the act of 1741 provided for. The Supreme Court held that a slave could be convicted of a capital crime on the testimony of another slave, though not supported by pregnant circumstances and notwithstanding the act of 1741. This opinion was really a step forward for the slave, for as a basis for this opinion it was shown that by the act of 1741 the life of the slave was more closely guarded by the courts, that by the act of 1793 capital crimes committed by slaves could be tried in the County Court, and that by the act of 1816 they could be brought before the Superior Courts. The act of 1816, by declaring that slaves should be tried in the same manner and under the same rules which governed the case of a white man, gave the courts authority to look to the common law for rules of evidence. If such were not the case, a slave would be placed on a better footing than a white person, for he could not be convicted on the evidence of a slave. This opinion was held by Justice Henderson and Chief Justice Taylor. Justice Hall, dissenting, held that the transfer of the cases of capital crime by slaves to the higher courts did not repeal the act of 1741, but simply changed the manner of trial, not the rules of the trial. He did not believe that slaves were more reliable witnesses in 1821 than in 1741. The question of whether any subsequent act of the legislature repealed an earlier act seems to have been a source of much argument at the bar and on the bench.

The case of *State vs. Adam,*[14] which was tried before Judge Paxton at the June term of the Superior Court of Northhampton county in 1824, deals with the jurisdiction of the Superior Court. The defendant was indicted for wilfully and maliciously

[13] 1 Hawks 434.
[14] 3 Hawks 188.

killing two mares. The indictment was annulled for want of jurisdiction, whereupon the State, by the prosecuting attorney, appealed. The opinion of the Court was that under the act of 1741, *on an indictment in the County Court*, a whipping and a loss of ears was the punishment for the first offense of the slave, while the second offense was punishable with death. The act of 1816 gave the Superior Court authority over all offenses, the punishment whereof extended to life. It was argued that since section 4 of the act of 1816 provided that "a slave convicted of a clergyable offense shall be entitled to the benefit of clergy in like manner with a free man," it was to be inferred that the Superior Court could deal with the cases where punishment was death on the second offense and in this case the offense was apparently a second offense. The Court held, however, that an act punishable by whipping and loss of ears on the first offense and death for the second, could not come under the jurisdiction of the Superior Court.

In a case in which the charge was stealing a steer, and it appeared in the trial that this was the second offense and incurred the punishment of death, the record of the Court was held to be faulty. The case was that of *State vs. Allen*,[15] tried at the June term of the Superior Court of Wayne County in 1825, with Judge Badger presiding. The prisoner was indicted at common law for grand larceny in stealing a steer and was found guilty by the jury. But on being brought to the bar for judgment benefit of clergy was prayed, whereupon the Solicitor, by a counterplea to the prayer of clergy, showed by the records of the Superior Court of Green County that the defendant had three years previously been charged with the commission of a felony and burglary and found guilty of grand larceny. The records showed he was allowed clergy by the Court, whereby he received a whipping (instead of a brand in the hand) as provided by the act of 1816. Judge Badger refused to pronounce judgment and ordered the prisoner released. The Solicitor appealed this decision and Chief Justice Taylor, in referring to the preceding case, held that the County Court alone could take cognizance of the offense.

[15] 3 Hawks 614.

In 1852, in the case of *State vs. Bill*,[16] it was held that a slave charged with a misdemeanor could be tried only by a magistrate. The master had appealed to all the courts on behalf of his slave. It was argued for the defendant that the magistrates were clothed with too much authority—because the words of the act of 1836, giving magistrates jurisdiction of misdemeanors, were too indefinite to explain the acts of slaves over which a magistrate had jurisdiction. While it might seem that this was a just plea, it must be remembered that it was impossible for the legislature to think of all misdemeanors and enumerate those which would violate the domestic order of the State. It seemed that much of the enforcement of the law must be left in the hands of magistrates, scattered over the State as they were, and the offenses, which were numerous, were no doubt properly left in their hands so that they might use sound discretion in punishing the offenders.

Chief Justice Nash gave an opinion in 1853 which would tend to protect the slave from excessive punishment. He held that a slave was not punishable under an act of the legislature where only the word "person" was employed, but that the word "person" included slaves in protecting them. The case before the Court for decision was that of *State vs. Tom.*[17] The defendant was indicted in the County Court of Anson for passing a counterfeit bank note. To this indictment he demurred upon the ground of lack of jurisdiction, and on an appeal to the Superior Court the demurrer was overruled. Justice Nash held that the indictment was under the Act of 1819 (Revised Code, ch. 34, sec. 60) which provided that "any person" guilty of passing or attempting to pass to any other person a forged, false, or counterfeit bill or note of any corporation or bank in the State, should be guilty of a felony. The punishment included a penalty of not over $5,000 and imprisonment for not over three years. While slaves were regarded as property for civil purposes, their lives, limbs, and members were guarded with the same care as those of the white population. The policy in putting such a construction upon penal statutes was that slaves were not embraced for punishment unless mentioned, but

[16] 13 Ired. 373.
[17] 36 Busbee 214.

only embraced under the word "person," for protection. The humane policy thus enunciated had been held previously declared by the Court in the case of *State vs. Small.*[18]

That the pro-slavery sentiment was increasing after the year 1831,[19] and that the legislature was giving voice to the sentiment, is brought out in the case of *State vs. Hannibal and Ned.*[20] In 1858 the defendants were charged with carrying arms. The case was discharged from the Superior Court after an appeal had been taken from both a magistrate and the county court, and a third appeal by the State brought the case before Justice Ruffin. The Court held that under the Act of 1854 no slave could keep a gun under "any pretense whatsoever."[21] In this case the slaves were each given a gun with which to guard their master's store by night, one sleeping in an adjoining room to the store and the other at a distance of about one hundred yards.

The whites were always on their guard as to uprisings among the slaves, and the fact that plots against the white population were discovered in 1802, 1805, 1821, and 1831,[22] must have had its effect on the legislature, and the legislation is upheld in this case. Under the act of 1729 a slave could hunt with a gun in company with a white man, and under the act of 1741 a slave could carry a gun by having a certificate from the master, which was granted him by the Court. By the acts of 1836,[23] and 1854, however, the master could not arm his slave for any purpose.

III

SUITS FOR FREEDOM

The Court was very liberal in the cases of suits for freedom. The cases seem to be those in which the whites attempted to reënslave Negroes who had lawfully gained their freedom. Though the acts of the legislature were becoming more strict regarding manumission, these cases were governed by the earlier spirit of the law. From the case which came before the Court in an attempt to establish the freedom of a slave, which had

[18] This case was not reported.
[19] Bassett, *Slavery in North Carolina*, p. 7.
[20] 6 Jones 67.
[21] Rev. Code, ch. 107, sec. 33.
[22] Boyd, *History of North Carolina in the Federal Period*, p. 218.
[23] Rev. Statutes, ch. III, sec. 23.

been gained in Virginia, it appears that there slaves could be emancipated by deed or will, while in North Carolina the filing of a petition in writing to the county court, pleading for the right to emancipate, was required, thus placing the right to emancipate with the judiciary and not with the owner.

The first case in which a slave was attempting to gain his freedom through the courts seems to have been that of *Evans vs. Kennedy*,[1] in 1796. This was an action of trespass and false imprisonment in which the defendant claimed that the plaintiff, being a slave, could not maintain the action. The plaintiff claimed that he was not a slave and on this point the issue was enjoined. Justices Williams and Haywood held that the evidence not being sufficient to prove to the jury the freedom of the plaintiff, the defendant should give bond and sureties to permit the plaintiff to appear at the next term and that he be treated with humanity till the case was decided. The final outcome is unknown.

In the case of *Gorber vs. Gorber*,[2] tried in 1800, Justice Taylor held that in an action to determine a slave's right to freedom the Court would, upon affidavit in cases where the defendant was about to send the plaintiff out of the country or adopt other means of defeating the ends of justice, require him to give security for the plaintiff's appearance and in the meantime treat him with humanity. Such opinions were to protect a Negro from being held in slavery unlawfully. In a case brought before the Court in 1805 the Negro was further protected by having the defendant give security that he would leave the plaintiff at liberty to go wherever he pleased in search of testimony to prove his freedom.[3]

Upon the trial of a Negro for his freedom in the Circuit Court in 1835, evidence was given which showed that the plaintiff, in the case of *Bryan vs. Wadsworth*,[4] had been a slave of one Elizabeth Henry of Craven County, who, in 1808, filed a petition in which she pleaded permission of the Court of Craven, to free the plaintiff for meritorious service at a time she thought proper. The records of the Court showed that the

[1] Haywood 423.
[2] Haywood 127.
[3] Haywood 345. An anonymous case.
[4] 1 Dev. & Bat. 384.

petitioner was given the permission prayed, upon complying with the directions of the acts of the General Assembly. In the same year the required bonds were given for the good behavior of the plaintiff. In 1820, however, his mistress sold him to a man from whom Wadsworth, defendant, purchased him. The plaintiff appealed from the judgment for the defendant. Justice Gaston held that a petition filed in the County Court praying permission to emancipate a slave for meritorious service at a time the owner might think proper, and a decree of the Court granting such a permission upon the owner's complying with the directions of the acts of the General Assembly, was not a valid act of liberation within the purview of the acts of 1777[5] and 1796,[6] unless other proceedings appeared upon the records. He further held that the giving of bonds would not make the act valid, that the act of manumission was to be by the master, not by the Court; the Court made the act lawful.

Chief Justice Ruffin was very liberal in his opinion in the case of *Sampson vs. Burgwin.*[7] In the trial before Judge Dick of the Superior Court of New Hanover County in 1838, the plaintiff, a Negress, alleged that though once a slave, the defendant had in 1809 procured the manumission of her mother and herself (she being then one or two years old) through the County Court of New Hanover, and as evidence she produced the record of the Court. The defendant introduced evidence to show that the Negress had been reputed to be a slave. The defendant argued that since the record of the lower court showed no record of meritorious service, as provided by the acts of 1777 and 1796, and since the plaintiff was then too young to perform such service, a verdict for the defendant should be found. Chief Justice Ruffin held that the county courts had at the time of manumission complete jurisdiction over the matter, and that the act of a court of such jurisdiction could not be contradicted; so the "liberation being entered of record" made the act legal and conclusive. He did not doubt, however, that this power was abused by the county court, and was therefore transferred later to the Superior Court. To the argument in the court be-

[5] Rev. Code, ch. 109.
[6] Rev. Code, ch. 453.
[7] 3 Dev. & Bat. 21.

low that there was no petition to procure manumission, Ruffin held that this was not necessary at the time of the plaintiff's liberation, such being required by the later act of 1830.

The question whether manumission of the mother frees the child when the manumission is secured by a deed or will and the child is born before the will or deed secures the manumission, was also before the Court. In two cases reported the opinions vary. In that of *Campbell vs. Street*[8] the plaintiff produced before the Superior Court of Person, in 1837, the will of John Campbell, of Virginia, in which he willed that "all the rest" of his slaves should be manumitted after his youngest child had reached the age of twenty-one. The plaintiff then showed that her mother was included among "all the rest" and that her mother had given birth to her after the death of the testator but before the "youngest child" had reached the specified age. She also proved that she had passed as a free person from the year in which she became of age, which was about 1815, till 1833, when the "youngest child" sold her to a "co-partner in negro trading" with the defendant, who brought her to North Carolina. She then produced the statute of Virginia allowing a master to liberate his slave by deed or will. There was a verdict for the defendant, and the plaintiff appealed.

Justice Gaston was of the opinion that there was no doubt of the intention of the testator to free the increase which was born before the "youngest" arrived at the age of twenty-one. The words, "all the rest of my black people," proved this intent, he thought. He also held that the mother being the property of the testator, the plaintiff was in law his property "as an incident to and the friut of" the property which he held in her mother. This opinion was given in 1840. In 1842, in the case of *Mayho vs. Sears,*[9] the circumstances were so nearly the same as in the case just mentioned that there is no cause for reviewing the facts. However, the instrument was a deed, not a will as in the preceding case. Either instrument was a legal means of manumitting a slave in Virginia. Justice Ruffin held in this case, citing Roman laws and the laws of other states, that the increase was a slave.

[8] 1 Ired. 109.
[9] 3 Ired. 224.

In the case of *Culley vs. Jones*[10] in 1848 Justice Pearson considered that after a period of thirty years of acknowledged freedom of a person of color, almost anything would be presumed in order to give effect to the act of emancipation. This was a liberal view and became the principle of the Court. In this case it was proved that by a will the executor, the defendant in the case, was to secure the emancipation of the plaintiff for meritorious service. The executor obtained the right or commission from the court to liberate the plaintiff, but did not give the required bond till about five years later, in 1816. From that date till 1848 the plaintiff had been regarded as a free person. Justice Pearson held that the executor, whose duty it was to give bond, could not take advantage of that commission, "much less a wrong-doer," after a lapse of so many years. The opinion in this case was also held in the case of *Stringer vs. Burcham*[11] three years later.

In the case of *Bookfield vs. Stanton*,[12] in 1858, the evidence for the plaintiff before the Superior Court of Craven County showed that for thirty years and more prior to his birth his mother and maternal grandmother were admitted to be free persons of color. The evidence by the defense tended to show that they were slaves. A bill of sale was offered to show that the plaintiff had been regarded as a slave, and an attachment levied upon the grandmother in 1809. The court refused to accept the evidence of the writing and on a verdict for the plaintiff the defendant appealed. The opinion of the Supreme Court, as delivered by Justice Battle, was that in an action to determine the right of a person of color to his freedom, where the question was whether the maternal grandmother and mother had, or had not, been treated and regarded as free for a long time, a bill of sale for the plaintiff, their descendant, was not material, but that an attachment levied upon the grandmother was pertinent and proper evidence; the judgment of the court below was reversed.

The case of *Jarman vs. Humphrey*[13] is very singular. This was an action brought before the Superior Court of Onslow

[10] 9 Ired. 168.
[11] 12 Ired. 41.
[12] 6 Jones 156.
[13] 6 Jones 28.

County in 1858 to try the right of the defendant to hold the plaintiff, David Jarman. David was owned for thirty years or more by Edward Williams, who sold him to his father, Benjamin, then a slave, and Williams in an affidavit stated that he had owned the prisoner for over thirty years and that his conduct had been of the highest degree. Benjamin manumitted his son in 1822, by regular court proceedings. Full copies of the proceedings of the court were produced. The required bond had been signed by David's former owner, Williams, and he had been regarded as a free person for over thirty years. It was argued by the defense that Benjamin was a slave at the time of the filing of the petition and could not own, and, therefore, could not emancipate slaves. The judgment was that the plaintiff recover one dollar and the costs. The defendant appealed from this judgment but the lower court was sustained by the Supreme Court. Justice Battle used the affidavit of Williams and held that where a former owner of a slave actively participated in a legal proceeding for his freedom, and for more than thirty years acquiesced in the judgment of the court which declared his freedom, whether such proceedings were regular or not, the title of such former owner was divested, and endures to the benefit of the colored person. It seems that the act of manumission might have also been declared legal in such a case on the ground that the records of the Superior Court were conclusive. This was so held in the case of *Sampson vs. Burgwin,* which I have already discussed.

IV

MANUMISSION

In the cases in which the individual slave sued for his freedom the Court was lenient. However, this was not so in cases interpreting the manumission laws. As these laws became more strict, the Court became more strict in its interpretations. The judiciary, as well as the legislature, was inclined to strictness in protecting the institution of slavery.

As early as 1801, in an anonymous case, it is evident that the Court followed the letter of the law.[1] The record stated that the testator devised that his executors should procure, if

[1] 2 Haywood 134.

possible, the emancipation of his slaves, but if this were impossible, the plaintiff should have them. Several sessions of the legislature had been held since the death of the testator but by none had the slaves been emancipated. Justice Taylor delivered the opinion in favor of the plaintiff, holding that the executors had only a reasonable time to perform the trust, and should have applied for the right to manumit as soon as they reasonably could. Since they had not done so, it was to be inferred that it was impossible to perform the trust.

This opinion was strengthened in the case of *Pride vs. Pulliam*[2] in 1825. By a will, in the year 1815, Nathaniel Jones had directed that his slaves be freed whenever the laws of the State would so permit, and, until that time, the slaves should be divided among his wife and children according to the statutes of distribution. Eight years after the probate of the will, and after the slaves had been delivered over to the wife and children of the testator as directed in the will, the executor, Pride, filed a petition to manumit one of the slaves, setting forth as his reasons meritorious service, a legal basis for such action. The petition was refused by the Superior Court of Wake County on the ground that the facts disclosed were not sufficient. The petitioner then appealed. Pulliam, the defendant, had come into the possession of the slave in question by intermarriage with one of the coheirs and legatees of the testator. For the Supreme Court, Justice Hall held that the petition having been filed eight years after the slave had been delivered in course of distribution, as the will directed, and as the testator had not continued the trust in the executor to secure the liberation of his slaves at any definite time, when they were delivered to his representatives, by the assent of the executor, the trust of the executor would cease to exist, and the slaves would become the property of the heirs.

An attempt to hold a slave in nominal servitude but in real freedom was severely handled by the Court because such acts increased the free Negro class, a thing greatly feared. A case illustrating this point was that of *Stevens vs. Ely* in 1829.[3] It was proven that a deed had been executed with the intent to procure the manumission of certain slaves by the defendant,

[2] 4 Hawks 49.
[3] 1 Dev. 497.

to whom they had been conveyed, but since a deed to effect manumission was contrary to the law, a trust resulted for the testatrix, for whom the plaintiff was executor. Chief Justice Henderson held that a trust excluded the idea that the defendant should hold slaves as property and that policy forbade them being held otherwise. The trust would, then, fall off and the defendant would hold them as property freed from the trust; or, the trust results for the donor or his executor. In giving this decision Chief Justice Henderson said: "There is no base design on the part of the maker to do an immoral act, or to cheat or to defraud another. The act is forbidden only by the stern policy of the State, necessary to support our institutions in regard to slavery. . . . Sound policy would require that the slaves should be forfeited, but we have no authority to make, only to declare laws." This is the cry of one bound by rules which his commonsense and feeling for humanity tell him are not just.

Justice Ruffin concurred in the opinion of the Chief Justice. Justice Hall dissented, declaring that he could see nothing illegal in the trust, since he had, in the case of *Contentnea Society vs. Dickinson*,[4] declared that he thought a religious society might hold personal property unlimited. The Contentnea Sociey was an organization of the Friends, and the Court held that a religious society could hold slaves for its use only. The Quakers being hostile to slavery and it being their custom to hold slaves in name only, the conveyance of a slave to said society was not valid. Regardless of such decisions, the Quakers, as a society, continued to hold slaves for the purpose of emancipating them.[5]

Most severe was the case of *Lemmond vs. Peoples*[6] in 1848. The facts were as follows: William Query, of Mecklenburg, conveyed by deed absolute a slave, Linney, and her child, to Peoples, the defendant. Linney was married to a free Negro. He also conveyed to the defendant twelve acres of land with a house on it in which she and the child and her husband were permitted to live. No consideration was paid, though the deed

[4] 1 Dev. Eq. 189.
[5] Bassett, *Slavery in North Carolina*, p. 32.
[6] Ired. Eq. 137.

was duly acknowledged. The defendant claimed that he was absolute owner, that the donor conveyed the woman and her child to him that he might care for their happiness and protection. The slaves were taken under the care of the defendant, who permitted the woman to live with her husband in the house provided for them, the husband paying a certain rent. Evidence was also introduced to show that the defendant exercised no control over the slaves but allowed the Negro woman "to go and come" at her will.

Justice Ruffin, in giving the opinion of the Court, held that the slaves were being held in a qualified state of bondage, a thing contrary to law, for the donee was to consult the "benefit of the Negroes and not their own emolument," and the trust provided for their "protection and comfort." Linney and her increase were given to the heirs of the donor, and the defendant was held liable "with just deductions" for the profits gained from the service of Linney while under his control, and he was also held accountable for costs in attempting to evade the law.

That a qualified state of slavery was not to exist was also brought out in the case of *Green vs. Lane*[7] in 1851. The evidence was that William S. Morris, of Newbern, in his will had appointed Lane executor and had given to him all his estate, except a Negro woman and her three children, to sell and use the proceeds to remove the slaves to a state where emancipation was unrestricted, and to use half of the funds to provide for the welfare of said slaves. By a codicil to the will, provisions were made for the care of the slaves in this State. After the death of the testator, in 1848, Lane and one Durand proved the will. In 1850 a bill was filed by the legatees praying that the provisions for the disposition of the Negroes be declared null and void. The opinion of the Court was that a person might send his slaves out of the State to be emancipated, provided the act was done with the bona fide intention that they should not return, but if they were sent with the intention of returning to reside in the State, the act was in violation of the laws and the manumission was void and of no effect. Further, the provision in a will that the slaves be sent out of the State to be

[7] 8 Ired., Eq. 70.

emancipated and to remain out, was revoked by the codicil which provided for a house and lot held in trust for them in the State. The latter trust revoking the former is, in itself, unlawful and results to the next of kin.

In the case of *Campbell vs. Smith* the plaintiff, by alleging that certain slaves were conveyed by a secret trust to be held in a state of "qualified bondage," sought to secure possession of them. The allegation was denied and it was fully proved by the defendant and witnesses that the intestate executed the deed conveying the slaves not for the purpose of having them held in a state of qualified bondage, but that she knew the Negroes were to be the slaves of the defendant and subject to his will. On this proof it was declared that the plaintiff had failed to sustain the material allegations of his bill, and the case was dismissed with costs.[8] While the Court was very strict in applying the laws regarding manumission, it did guard the owner against unscrupulous persons who would by any means take away his slaves.

The case of *Redding vs. Jones*[9] decided in 1858, shows that within the range of preventing an increase in the free Negro class, the Court was disposed to be as humane as possible. The facts were as follows: Annie Woods, of Orange, conveyed by deed to the defendant, Long, three slaves to be held in trust during her life; at her death they were to be freed, if they chose to be sent to Liberia or some free state; but if they did not so choose, they were to belong to Alexander Findley. The plaintiff, Redding, administrator of the estate of Annie Woods, alleged that the deed was obtained by undue influence in the time of old age when Annie Woods was not mentally capable of making a contract, and he insisted that the deed was void because of the illegality of the purpose of manumission and that the trust should therefore revert to the grantor.

Justice Ruffin, in giving the opinion of the Court, dismissed the allegation that the party to the deed was not mentally sound, on the basis of the evidence in the case. It was insisted, however, that the deed was void because manumission could be secured only by the owner or by an executor under the direction

[8] 1 Jones Eq. 156.
[9] 4 Jones 216.

of a will, or on a petition to the Superior Court. In answer to this, the Court held that under a deed upon a trust the trustee becomes the owner, and he could procure the emancipation of slaves under the laws of the State or carry them to a free state. The law where the trust was to take effect would govern, hence to send the slaves to a free state was not unlawful. Upon insistence of the counsel for the plaintiff that the trust failed because it was made to depend on the will of the slaves to go away or remain in the state as slaves, and that they had no legal capacity to make an election, Justice Ruffin quickly dismissed the objection by saying that this point would not "bear debate in the courts of the State." "In the second place," he said, "it is not true in point of fact or law that slaves have not mental or moral capacity to make the election to be free." From the nature of slavery, however, they were not legally allowed to make contracts or to acquire property while remaining in the state. This opinion was given by Justice Ruffin, who had not always been disposed to such liberality.

V

THE SALE OF SLAVES

The cases coming under "sale of slaves" were those to determine the rightful owner of the slave or slaves in question, and, therefore, give little or no idea of the attitude of the Court toward slavery as an institution. The decisions were strict in the majority of the cases, and especially where a creditor was involved, for creditors had to be protected against the sale of slaves of a debtor, upon which slaves he might be forced to levy execution for a debt. There was much doubt as to whether the acts governing these cases applied only where a third party was involved. There was also the question of whether the cases were limited to the acts of the legislature, or could be tried under the common law.

The case of *Knight vs. Thomas*[1] in 1796 shows how the rights of the creditor were protected. The defendant, a sheriff, had sold the slaves in controversy as the property of one Pass to satisfy an execution for one of Pass's creditors. Evidence showed that Pass had conveyed the Negroes by parole before

[1] 1 Haywood 289.

witnesses to the wife of the plaintiff, Knight, sometime before the creditor obtained judgment and before the debt was contracted. It was argued at the bar, and admitted by the Court, that the judges had decided heretofore that under the act of 1784[2] a parole conveyance of slaves was good as between the parties themselves, but was void as to creditors at the time of the conveyance or to those who became creditors after conveyance; for the Court held that the purpose of the act was to prevent creditors from being defeated of their debts which were contracted upon the credit of visible property. The Court held that Pass was a debtor to that creditor upon whose execution the Negro was sold. This opinion was upheld in 1822 in the case of *Rhodes vs. Holmes*.[3]

In 1798 we have the case of *Cutler vs. Spillar*,[4] in which it was argued that a bill of sale given by the defendant for certain slaves was void because it was given without an attesting witness. The Court held that the act of 1792 supposed the case of a written transfer produced on trial, "purporting on the face of it to have been attested," and directed it to be proved by the attesting witness if possible, because such was the best evidence. Further, an unattested transfer was not in its meaning and the act of 1784 was applied only where a creditor was involved, not between vendor and vendee. It was held that the case must be decided by the rules of common law, and by the common law a deed was not void because of want of attestation and could be proved by other means. By the same method of reasoning the Court held in 1812[5] that a bona fide sale, according to the rules of common law, transferred the property and was good without a bill of sale, as required by the act of 1792. In this case the defendant had agreed to hold a negro slave for the plaintiff because she was young. Where a third party was not in question, the Court was very liberal, as here shown.

In 1807 another liberal opinion was given in the case of *Governor vs. Howard*.[6] This was an action of debt to recover from the defendant the penalty of one hundred pounds for selling a slave imported into the State contrary to the provisions

[2] Rev. Code, ch. 225, sec. 7.
[3] 2 Hawks 194.
[4] 2 Hay. 61.
[5] *Bateman vs. Bateman*, 11 Mur. 97.
[6] 1 Murphy 168.

of the act of 1794, knowing the slave to have been so imported at the time of the sale, though not at the time he purchased the slave. B. F. Moore argued for the defendant that the act in question applied only to the sellers who contributed to the evil intended to be suppressed by the legislature. Further, if the legislature had the right to control a citizen in the use of his property, all ownership was gone. So the act did not apply to the purchaser and seller as it did to the importer. If such was the case, the act of the legislature would extend on down the line and affect every sale and purchase of the slave, regardless of the number of such sales.

The Court held that an honest purchaser of a slave, one without notice of his illegal importation, who afterwards learns of the illegal importation and sells the slave to another, is not liable to forfeiture under the act of 1794. This was a very liberal interpretation of the act in question, for it stated that "every person who shall knowingly sell, buy, or hire such a slave (one illegally imported), shall in like manner forfeit and pay the sum of one hundred pounds for each slave so sold, bought, or hired to be recovered in the name of the State for the time being by action of debt."

In 1818 the case of *Cummings vs. MacGill*[7] was brought before the Court to determine the ownership of a slave which had been put up for public sale. The slave in question was exposed to sale and the defendant was the highest bidder, but not being able to pay for the slave at the time, he was given till the following day to make payment, at which time he failed to do so. A few days later, the sheriff gave to the plaintiff, who was the next highest bidder, a bill of sale for the slave. Sometime later the defendant obtained the slave while she was at a dance and held her till she was replevied. Thus there was an action of replevin.

In giving the opinion of the Court, Justice Daniels and Chief Justice Taylor held that the sheriff acted within the bounds of the law, for the defendant MacGill was not the highest legal bidder, because he did not have the money with which to make the payment at the time of the sale, or on the follow-

[7] 11 Murphy 357.

ing day as he agreed he would have, and for these reasons his bid became void. The sheriff, then, had the right either to expose the property again to public sale or validate and confirm the next highest bid by receiving the money and making a title to the bidder.

Just as the above case shows how attempts were made to get possession of slaves by fraud, the case of *Mushat vs. Brevart*[8] brings out the point more clearly in a strict protection of the owner. This case came before the Court in 1833 and was an action of detinue to recover a slave. The facts of the litigation were as follows: The executors of one Thomas held a public sale at which the slave in question was bid off by the plaintiff. He and the executors made an agreement that he was to give bond with approved security on the day following the sale, at which time he proved the executors refused to deliver the slave on the tender of the bond after he had also been entered on the account as purchaser—all of which the executors were aware of. The defendant purchased the slave in question from the executors, subsequent to the day on which the bond of the plaintiff was tendered.

Justice Gaston held that under the act of 1784 it was necessary for the plaintiff to show that the executors had transferred the slave by exhibiting a written transfer as required by the act or by proving such a sale and delivery as the act of 1792 required. No written transfer was alleged, and no delivery was made by the executors personally; the plaintiff, therefore, had no possession of the slave before he tendered his bond and demanded delivery. The executors, then, broke their contract with the plaintiff and later sold the slave to the defendant. Gaston also held that while the act of the auctioneer in accepting the bid of the plaintiff was a delivery, it was not delivery in law. The acceptance of bonds by the executors and legal delivery by them was the thing to be considered, for they were the ones to fix the terms of the sales, the auctioneer being only their servant. Though it seems the slave should have gone to the plaintiff, as the highest bidder, and one who tendered his bond, he lost by a strict adherence to the law.

[8] 4 Dev. 73.

which, it was pointed out, would prevent fraud and perjuries. As suggested in the dictum of Justice Gaston, the executors should have been sued for breach of contract.

From the nature of the case of *Caldwell vs. Smith*,[9] decided in 1838, the verdict of the jury of the Superior Court was affirmed in the opinion by Justice Gaston. This seems to be a case in which the defendant tried to evade a lawful debt because of the loss of a slave through the death of the Negro. There was an action of assumpsit brought by the plaintiff to recover from the defendant to whom the slave was alleged to have been sold and delivered. The evidence below was given before Judge Pearson of the Superior Court of Rockingham. One Latta conveyed a slave to the plaintiff, Caldwell, in trust, to pay and secure certain debts. Later both appointed by parole one Donnell as agent to hire out the slave and to sell him as soon as possible. Donnell hired the slave to a man by the name of Forrest for the year 1833. In November of that year Donnell sold the slave to the defendant, and persons were called upon to witness the sale. The defendant was to take possession of the slave about January, 1834, when his time was up with Forrest, and to notify Donnell by letter of his having done so. The evidence left it doubtful as to whether the defendant was to give Donnell his note for the price at the February Court in 1834 or whether he was to take the defendant's letter as evidence of the debt, the debt being payable on demand with interest after the first day of January, 1834. There was also doubt as to whether the sale was to be affected by the above stated bargain or whether Donnell was to secure the bill of sale from the proper parties and deliver it to the defendant, or whether or not a bill of sale was intended to be procured by Donnell and the sale not to be affected by delivery but by the defendant holding as bailee the slave until the sale was consummated by the bill of sale. It was proved that Donnell notified the plaintiff of the sale and that the plaintiff assented. The proof also showed that the defendant notified Donnell that he had possession of the slave and was ready to execute his bond according to the contract. In February, 1834, the Negro died, whereupon the defendant refused to pay the money or give his note.

[9] 4 Dev. & Bat. 193.

Judge Pearson instructed the jury that if they found it was intended that the property in the slave was to pass by delivery and sale as further assurance of the defendant's title, they should find for the plaintiff; but if they found it was to pass by a bill of sale and that the defendant took possession to hold as bailee until the bill of sale was procured, they were to find for the defendant. The verdict was given for the plaintiff, and on an appeal by the defendant it was affirmed by the Supreme Court, Justice Gaston writing the opinion. He held that where there was so much doubt as to whether delivery was to effect the sale, or whether the defendant was to hold the slave as bailee until the sale could be effected by a bill of sale, the question was one to be submitted to a jury as one of fact to be determined by them. His opinion also was that the act of 1792 applied to a sale between vendor and vendee, although no creditor or purchaser was concerned.

In 1839 the case of *White vs. White*[10] presented a very easy case for Justice Gaston. The action was one of detinue for two slaves, Lucy and Baccus. The plaintiff claimed the slaves under the will of his father, and he proved that the above named slaves were in possession of the defendant and that the action had been brought within less than three years from the death of the testator's wife, to whom the slaves were first willed, passing on to him at her death. He further proved Baccus was born to Lucy after the defendant had taken Lucy into his possession. For the defendant it was proved that the testator had been in debt and had mortgaged his slave Lucy to his creditor for the purpose of securing the debt, and that after the testator's death, his wife and the plaintiff sold and delivered the slave, Lucy, to the creditor to discharge the debt. The defendant then bought her from the creditor, and after taking her into his possession, the boy Baccus was born. The plaintiff then replied that no bill of sale was in evidence. The Court held that a parole sale and delivery of a slave made by the tenant for life and remainderman was valid, because the act of 1784 did not prevent a parole conveyance of slaves from being good between the parties thereto. If it did, the act of

[10] 4 Ired. 563.

1792 declared bonafide sales accompanied by delivery valid without a bill of sale.

In the case next to be considered we find Justice Ruffin going back to the cases of *Knight vs. Thomas, Cutlar vs. Spiller, Rhodes vs. Holmes*, and *Bateman vs. Bateman,* all of which I have discussed, and holding that a sale of chattel at common law vested a title in the purchaser without delivery, as did the acts of 1784 and 1792, and that they only affected the rights of creditors. The other cases I have discussed held either a bill of sale or a delivery as necessary, where no third party as creditor was involved. The opinions, however, seemed to work justice in the cases decided—that is, they seemed to leave the property in the hands of those to whom it rightfully belonged.

The evidence in this case, that of *Woods vs. Fuller*,[11] in 1844, was that a physician had treated the slave, a Negro girl, at the expense of the owner, the father of the defendant, till the owner told the defendant that if he would pay for the treatment and have her cured, he might have her for his property. The defendant employed the physician, who effected a cure. Along with the above evidence, which the physician gave, he stated that he had often heard the father of the defendant, now intestate, declare the slave to be the property of the defendant because of the above facts. By another witness the defendant also proved such statements of his father, and showed that since the intestate's death the slave had lived on his farm. The relator and next of kin of the intestate, Woods, alleged as a breach of the conditions of an administration bond, on the part of the defendant as administrator of his father, that he had not accounted for the Negro girl. The opinion of Judge Pearson of the Superior Court was different from that of Justice Ruffin, for he charged the jury that the defendant to claim title must prove a bill of sale (act of 1784) or a sale accompanied by actual delivery (act of 1792), and "in this case no such could be inferred."

The case of *Huntly vs. Ratliff*[12] presents a very novel case. This was an action of detinue, brought in 1845, for several

[11] 5 Ired. 26.
[12] 5 Ired. 542.

slaves which had been the property of the plaintiff. The plaintiff had separated from his wife and in consideration of $200 paid him by the defendant, he had delivered certain slaves to him to be held in trust for the use of his (the plaintiff's) wife. Afterwards, he and his wife became reconciled, and the plaintiff brought this action to recover the slaves. Justice Daniel, in giving the opinion of the Court, held that the title passed to the defendant by sale and delivery and the plaintiff could not maintain the action. In rendering the decision, he said: "Whether a court of equity would permit the husband to call for the legal title, and upon what terms, or hold the defendant a trustee of the slaves for the separate use of the wife is not for us to decide, sitting in a court of law." This was a strict adherence to the laws governing the case.

"This seems to be as plain a case for the plaintiff as can be." These are the words of Chief Justice Ruffin in opening the decision of *Smith vs. Davis*[13] in 1848. The action was that for trover for a female slave and her children. They were held by sale and by actual delivery, yet the defendant had come into possession of the slaves in question after the former owner had sold and delivered them to the plaintiff. Sale and delivery only being necessary to pass title by the act of 1792, the opinion was in favor of the plaintiff. In giving the opinion, Chief Justice Ruffin remarked that no injury could come to the defendant, for the action was only for damages from the former owner and not for replevin of the slaves.

Though the judgment of the lower court was reversed in the case of *West vs. Tilghman*,[14] tried in 1848, the issue involved was similar to the case just described. The facts were these: one John Watson had conveyed, by deed, to a trustee for the payment of his debt, all of his property including a slave, Reuben. The trustee took the slave into his possession after Watson's death and hired him out till the time of the succeeding term of the County Court of Lenoir, when he sold him at a public auction to the defendant. Among the debts secured was one to the plaintiff, West, who, it was proved, knew of the sale

[13] 8 Ired. 508.
[14] 9 Ired. 163.

but made no objection to the title of the trustee to the slave, and it was on this last point that the jury found for the defendant. For the Supreme Court Justice Nash held that such action on the part of West did not amount to an estoppel. It was even possible, he held, that the plaintiff did not then know that he held title to the slave, it having been made to him in the deed to the trustee. Further, the title to a slave can only be conveyed in writing, except when delivery accompanied a sale, or by gift evidenced by a written instrument to be attested by a subscribing witness and proved and recorded.

In the case of *Featherstone vs. Featherstone*,[15] however, it seems that a sale and delivery were not sufficient to pass title, at least when the contract called for a bill of sale. This case was tried in 1859 at the Superior Court of Henderson and a verdict was given for the plaintiff; whereupon the defendant appealed and a new trial was ordered. The suit was that of trover for the value of a Negro boy. The plaintiff relied on the deposition of one Hawkins to show title. Hawkins was in the county dividing the property of Berryman Featherstone, and the slave, John, fell to the lot of William Featherstone, the defendant. Later William traded John to M. C. Featherstone, plaintiff, for $200. In his deposition Hawkins stated that he saw the plaintiff pay the defendant between fifteen and twenty dollars in silver, and defendant then delivered John and they agreed to "draw the writings" two days later. It did not appear that the bill of sale was ever executed. The defendant had come into possession of John again, and in attempt to retain him he insisted that if the testimony of Hawkins were true, it was an executory contract between him and the plaintiff. The lower court was of the opinion that the contract was executed. Justice Nash reasoned by the case of *Caldwell vs. Smith,* already discussed, that if a bill of sale to be given on a subsequent date was to be further evidence of a sale, the contract was complete; but if it was the intention of the defendant that the title should not pass till the bill of sale was given, the contract was not complete. The intention, then, of the parties was a matter for a jury to decide, not the Court; therefore, the *venire de novo.*

[15] 11 Ired. 317.

A slight difference is noted in the case of *Osborne vs. Horner,*[16] in 1850, in which the title of a slave passed by a bill of sale and actual delivery to the plaintiff by an agent on the oral authority of the defendant. Action of trover was brought, in which damages for the conversion of the slave were demanded, the slave being in the possession of the defendant. Justice Pearson was of the opinion that the bill of sale given by the agent was inoperative so far as the principal, the defendant, was concerned, because the agent was not authorized to bind him by deed. Therefore, the bill of sale had no effect in reference to the plaintiff and the defendant, and the defendant was thus protected against fraud. In short, the unauthorized bill of sale was mere surplusage, the sale and delivery being complete.

The case of *Benton vs. Saunders,*[17] in 1853, was to determine whether or not a bill of sale must be signed by the attesting witness at the time of its execution to make it valid. In this case the plaintiff claimed the slave under a bill of sale made to him in 1840, to which the attesting witness signed his name in 1844. The defendant claimed the slave by purchase under an execution inuring in a suit by himself, upon the one who had issued the bill of sale to the plaintiff. The defendant got possession of the slave in 1849. It was also proved to the minds of the jury in the lower court that the plaintiff had paid off the debts of his vendor to the amount of $1,000 in consideration of the value of the slave. In giving the opinion of the Supreme Court, Justice Battle held that the bill of sale was no attempt at fraud, but was simply an imperfect instrument till attested by a witness. Further, the plaintiff could not be held responsible for the sale of the slave under execution, since he had paid the debts of the vendor as the consideration for the value of the slaves. So it was held by the Court that it was immaterial at what time the attesting witness signed the bill of sale, provided it was done *bone fide* and before the right of the third party was attached.

The Court of Equity was called into play in the case of *Morris vs. Rippy.*[18] The action brought was trover, and the

[16] 11 Ired. 359.
[17] Busbee 360.
[18] 4 Jones 533.

case came before the Court in 1857. The plaintiff produced a copy of a bill of sale from the register's book, and the contents were proved by attesting witnesses. By the same witnesses the defendant proved that the plaintiff was an infant at the time of the sale and that the father of the plaintiff was then in an insolvent condition, and that the slave was paid for in consideration of land and, further, that the deed for the land which the father gave for the slave was given in connection with the bill of sale made in the name of his infant, now the plaintiff, that he might escape his debts. Later, the proof was, the defendant, a creditor, caused execution to be levied on the slave, who was sold at public auction. Justice Battle held that where the real purchaser fraudulently has the title made in secret trust for himself, it cannot at law be subjected to the purchaser's debt, but must be pursued in a Court of Equity. Here the title passed to the infant by the bill of sale, for such was the *intention* of the parties, and not that sale and delivery should vest the title in the plaintiff's father. The decision seems to be what we should expect since a bill of sale and delivery was in evidence.

An action of replevin for a slave was the next case called to the attention of the Court. This action was brought in the case of *Brown vs. Brooks*,[19] tried in 1859. The plaintiff, Brooks, in claiming title to a slave gave in evidence a "paper writing" delivered by the defendant, Brooks, to the bargainors of the plaintiff, which acknowledged the receipt of a certain sum, expressed to be part payment of the price of the slave and binding himself to deliver the slave, then a runaway, to the plaintiff. Justice Manly held that this was no evidence of an executed contract by which the property was vested in the vendee. It was not executed because something was left for both parties to do, one to deliver the slave, the other to make complete payment. The instrument was, therefore, executory in nature and could be altered by oral testimony, but such would not be the case in written evidence of a contract, whether executed or executory in nature.

In an action of trover for certain slaves, the plaintiff in

[19] 7 Jones 93.

the case of *Eure vs. Parker*,[20] tried in 1860, offered in evidence as a part of his claim a deed of trust conveying lands and slaves to secure certain debts of the grantor. The deed had no subscribing witness. The council for the plaintiff argued that the deed, dated June 5, 1856, might be upheld as a "power of attorney." The argument was refuted by Justice Manly in giving his opinion, for, as he pointed out, under a power of attorney the attorney acted for and in the name of the principal, while under the said deed it purported to convey the legal estate in the property with the power to sell. The deed, then, insofar as it concerned the conveyance of slaves was void, as there was no instrument as required by statute.

The last case to be considered in this group seems to be a plain case of an attempt to rob a man of his rightful property, but through the Supreme Court he retained it, the verdict being against him in the lower court. The case was *Bailey vs. Moore*,[21] tried in 1863. The evidence was that Nelson, an agent of the plaintiff by a parol agreement, agreed to the exchange of slaves with the defendant, Moore, and that Moore's slave went immediately into the hands of Nelson, but Nelson's slave being a runaway, it was agreed that Moore should take the Negro into his possession whenever he could do so. Moore later came into possession of the runaway slave, and the plaintiff then claimed him because the delivery did not take place at the time of the sale! Chief Justice Pearson held that when Moore came into possesstion of the slave, the sale was completed and the title passed to him.

VI

GIFTS OF SLAVES

As in the sale of slaves, the creditor must likewise be protected against the unscrupulous gifts of slaves which were made to defraud him of his just debts. So an act of 1806 provided that a gift of slaves must be in writing and attested by a subscribing witness. In cases coming under this group there was the question of what constitutes a sale or a gift of slaves. The question of simple transfer altered the conditions, as is

[20] 7 Jones 424.
[21] 1 Winston 86.

brought out in the case of *Reeves vs. Edwards*, which will be discussed later.

The first case to come before the Court concerning the right to hold a slave as a gift was that of *Cotton vs. Powell*,[1] in 1816. The plaintiff claimed the slave as a gift by parol from his father-in-law. The proof of the gift of the slave was that his father-in-law had sent the slave to the plaintiff's house. The defendant claimed the slave under an unattested mortgage made before the gift. Chief Justice Taylor held that the mortgaging of a slave was valid, under the act of 1792, without an attesting witness. The gift was held void because it was not by a written transfer, as required by the act of 1806.[2] Justice Ruffin upheld this decision in 1831.[3]

The above cases were followed by the case of *Cobb vs. Hines*[4] in 1853, in which the grantor in a deed of gift sought to recover slaves mentioned therein along with their increase. The evidence was that the plaintiff had appointed the defendant agent of the slaves named in the deed for the use of his daughter, wife of the agent and defendant. Battle gave the opinion of the Court. He held that it was the intention of the grantor that the slaves were to be held in trust for the wife of the defendant and that the word "agent" could properly be held to mean trustee, and that no technical words were necessary in a bill of sale or deed of gift of slaves. In an action of ejectment, which need not be discussed here, between the same parties, judgment by Battle was given for the defendant by his declaring the deed valid. He did not believe that grammatical construction and technical words were so important as the intent of the grantor.[5]

An action of detinue for eight slaves was the next case to come before the Court, and it shows very clearly how one must be protected in his right of title to slaves. This was the case of *McLein vs. Nelson*,[6] tried in 1854. The plaintiff claimed title as the administrator of one Nelson, the husband of the

[1] 2 Carolina Law Repository, 431.
[2] Rev. Stat., sec. 37, ch. 19, 20.
[3] *Atkinson vs. Clarke*, 3 Dev. 171.
[4] Busbee 350.
[5] Busbee 343.
[6] 1 Jones 396.

defendant, Mary Smith, who he alleged acquired the slaves by the intermarriage of the defendant in Virginia in 1845. After 1845 the defendant and her husband lived in Alamance County till the death of Nelson in 1852. The defendant claimed the slaves by virtue of a deed which she produced, by which the slaves were to be held in trust by one Wilson for her own benefit until the contemplated marriage of herself and the intestate of the plaintiff should take place; then they were to be for the joint use of each. The deed was duly executed by the intestate, Nelson, and "Mary B. Williams," now the wife of Nelson, and a third seal had been affixed but no signature appeared by it. The plaintiff contended that the deed was void because the trustee did not sign it, the third seal being supposed to have been intended for his signature, and because no evidence showed that he had accepted it. Justice Pearson, for the Court, held that where a deed conveyed slaves upon a certain trust duly executed, proved, and recorded, it was valid although an extra seal had been added but not signed by the trustee. To the second claim of the plaintiff, he held that the trustee is not a necessary party to a bill of slaves, due execution by the grantor only being necessary.

In the case of *Reeves vs. Edwards*[7] Justice Pearson held that a transfer of slaves required no bill of sale or sale and delivery, for the acts of the legislature applied only to sales and gifts. In this case there was no gift or sale, simply a transfer. This is the only case of this nature that seems to have been reported. The evidence in the case, tried in 1855, was that one George Reeves died intestate while living in Virginia. The widow was appointed administratix. Soon after his death she moved to North Carolina, bringing her six children, her slaves and other property with her. She then married the defendant, Edwards. As the children grew up she gave each a slave, retaining one for herself. After this had been done, she met the six children at her home, where it was agreed that she was to have an *absolute estate* as a child's part, which in this case was one-seventh, if she would surrender her claim, under the statute of Virginia, to a *life estate* in one-third of the slaves.

[7] 2 Jones 457.

The above decision in the case was given in answer to the claim of the plaintiff that the conveyance was not made by the children to the mother in writing.

The next case of this nature to confront Justice Pearson was the case of *Cox vs. Humphry*,[8] tried in 1859. The action was that of trover for slaves. The proof was that in 1801 Moses Cox, of Sampson County, gave to his children by parol all of his slaves. On the occasion of division by the trustees, Ellis, a son-in-law who received a more valuable share, paid money to the others who had a less valuable share. In 1857 Ellis, jointly with the trustee, Ward, conveyed the slaves which he held, a woman and four children, to the defendant. The defendant claimed that the money paid to the children of Moses Cox by Ellis constituted a sale and delivery. In answering this claim Justice Pearson held that the act of Ellis was an act of compensation and in no way affected the father, Moses Cox. He clearly pointed out the fact that the children receiving both the slaves and the money could not be purchasers. Further, by the act of 1806 a gift of slaves must be in writing and attested by a subscribing witness, and that there was a gift in this case was not questionable because of the words of the father, "Take them [the slaves] and divide them among yourselves," proved the conveyance to be a gift. In concluding the opinion, the Court held that the transaction was still a bailment, *not a sale and delivery,* as to any of the children, and after the father's death, the executors could recover the slaves. This close adherence to the act of 1806 shows how the rights of creditors were protected against unscrupulous gifts of slaves.

VII

CONCERNING THE INCREASE OF SLAVES

In cases concerning the increase of slaves the cases were decided by the rules in *Tims vs. Potter*.[1] The opinion of the Court was that the increase of slaves goes to the remainderman, not to the tenant for life of the increase. This opinion became the universal practice of the Court. It seemed to be the rule for the increase so to go in order to compensate for

[8] 6 Jones 405.
[1] 1 N. C. 8.

the deterioration of the parent or parents while in the service of the owner for life.

The pivotal fact in the case, tried at the Hillsborough Court just before 1790, was a gift by one Glover to his daughter of a female slave, reserving the use of the Negro during his life. Judgment was obtained against Glover and execution was levied on the slave, Potter becoming the purchaser. Tims married the daughter of Glover, and, after Glover's death, he brought suit for the slave and her children born during the life estate. The Court held that the "intermediate is satisfied with the *labor* of the negro . . . breeding is the order of nature, not of the master." It was further stated that the construction had been uniform ever since the settlement of the country that the issue went to the remainderman, the labor being all that was understood or intended for the use of the intermediate. So the decree of the Court was: "The increase of slaves belongs to the remainderman, not to the tenant for life of the mother." The decree was upheld in the case of *Glasgow vs. Flowers*,[2] tried in 1795.

This case was decided according to the principle in *Tims vs. Potter* and established the rule of law in such cases. Here a bill in equity was filed to be relieved of the judgment governed by the rule of the above case. In the Court of Equity it was held that where the law can give adequate redress, Equity would not interfere. Equity cannot, it was held, change the established rules of law nor act as a court of errors, to correct erroneous decisions of law. When slaves are given to one for life, remainder over, the increase born during the life interest will go to the principal. The Tims-Potter case was therefore left untouched.

In a case tried in 1825, that of *Erwin vs. Kilpatric*,[3] no distinction was made in the decision from that in the cases recited above. The increase in question was born "just before" the death of the person holding a life estate in the mother. The facts of the case were as follows: A slave, Lyd, was willed by William Edwin, of Rowan County, to his wife as long as she remained a widow or till her death. During the widow's life

[2] 1 Hay. 234.
[3] 3 Hawks 456.

estate two children were born to the slave who was to go, by the will, to the testator's son, John Erwin, at the death or marriage of the widow. The children were born just before his mother's death. The defendant was the executor of the will and the daughters of the testator prayed that he be compelled to make distribution among them and their brother John, the surviving children. John, then becoming a defendant, answered by claiming the two children because of their birth to Lyd to whom he claimed title by the will at the death of his mother. The duty of the executor was over as soon as he placed the Negro in the hands of the wife of the testator; so the claim now remained against the legatee, John Erwin. Justice Ruffin, giving the decision of the Court for the defendant, held that since the time of the case of *Tims vs. Potter*, "it has been a fixed rule of property that the increase of slaves born during the life of the legatee for life belong to the ulterior legatee who is the absolute owner."

The case to be considered next differs from the previous cases in that the husband becomes the ulterior legatee at the death of his wife, being named in the will conveying the slaves in question. The case, *Patterson vs. High*,[4] was brought up from the Court of Equity of Orange in 1851. The plaintiff produced a will of one J. B. Shaw as proof that his wife was to have a number of Negroes during her life and at her death they were to be divided among her children. One of the slaves, Isabel, he willed to his daughter, Polly, at the death of her mother. High, the defendant, was the only living executor of the will at the time of the death of the testator's wife. The daughter, Polly, married one Lemuel Morgan. She died before the death of her mother, leaving no children. At her death Morgan requested administration on her estate and it had been duly granted the plaintiff. The bill also alleged that on the death of the wife of the testator, High refused to pay for or deliver the slave Isabel and her increase, claiming that since no children were born to the wife of Morgan, the ulterior legatee, the estate bequeathed to her would go to her brothers and sisters. The husband, it was held, has the right to administer

[4] 8 Ired. Eq. 52.

upon the estate of his wife upon her death, but he may assign the right to another and he being the next of kin, as deemed by law, would have possession of the slaves in question, and by the rule laid down in *Tims vs. Potter* the increase go to the husband as remainderman and not to the tenant for life of the mother.

VIII

THE MASTER'S LIABILITIES

A. For Acts of Slaves

For the acts of slaves the master was not held responsible if they were committed without his assent or his direction, but for acts of slaves due to negligence he was held responsible. This principle of the Court protected the master against being held liable for all crimes of the slave, and it protected the slave from a dangerous control by the master. Herein it may be seen that while a slave might be held as a chattel, the Court did recognize that he was something more than a chattel—he was not considered wholly irresponsible for his acts.

An action of trespass against the owner of a slave is the first case brought to our attention under which a master is held responsible for the act of a slave. This action was brought against the defendant in the case of *Campbell vs. Staiert*,[1] tried in 1818. The action was against the defendant for timber cut by his slave in the woods of the plaintiff. In the lower court of Cumberland County the slave was found guilty of the act without the command or assent of the master and a verdict was given for the defendant, whereupon the plaintiff appealed. On appeal, it was held that while a master could be held liable for damages arising to another through negligence or unskillfulness of his servant acting in his employment, no action could be brought against the master for the wilful and wanton act of a slave without the assent or command of the master.[2] Chief Justice Taylor made a very timely statement when he said: "It is true that a man is liable for trespass committed by his cattle, but this is because he is bound to keep them within a fence." This was in answer to the argument that one would be liable

[1] 2 Murphy 389.

[2] Cf. Lord Kenyon in the case of *M'Manus vs. Crickett*, 1 East 106.

for acts of trespass by his *animals* and therefore by analogy one should be liable for trespass of a *slave*.

In 1845 the above opinion of the Court was upheld by Justice Ruffin, when it was found that a slave had cut timber in the woods of another without the command or assent of his master. This decision was given in the case of *Parham vs. Blackwell*.[3] Justice Ruffin believed that the true ground of the doctrine of irresponsibility of a slave was that the master could not be held responsible for the wanton or wilful acts of his slave, for they were not done at the direction of the master or with his assent. According to English law, he held, the master was never held responsible unless the acts were committed with his assent or at his direction. He further held that a master was not compelled to keep the slave always in his presence to avoid being held responsible for the acts of the slave, and to hold a master responsible for the wilful and wanton acts of a slave committed without the assent or command of the master would be a dangerous policy, for the slave could hold the master responsible for any crime and the master would be given dangerous control over the slave. The saneness of such an opinion is readily perceived, as it likewise seems to show a change of mind on the part of the Justice concerning a "dangerous control" of the master, for, as has been shown before, he once upheld the right of absolute control.

The case of *Garrett vs. Freeman*,[4] tried in 1857, brings out the question of negligence on the part of a slave. The proof was that some slaves of the defendant at his direction had set a brush pile afire, and the fire had spread to the lands of the plaintiff, burning a house and some timber. The command of the master was that the brush be fired if the wind were still. On his leaving home early in the morning, the slaves, soon after his departure, set fire to the brush while the wind was still. Later in the day, however, the wind began to blow, and it being very dry weather and the surrounding conditions being propitious, the fire easily spread to the adjoining tract of land belonging to the plaintiff. There was further proof of the conditions which made the spread of the fire to the adjoining tract of land

[3] 8 Ired. 446.
[4] 5 Jones 78.

a very easy matter. Justice Pearson in giving the decision of the Court, held that the conditions surrounding the brush pile and the nature of the weather were a clear proof of negligence on the part of the master and that the slaves were not responsible. This decision was very liberal, and thus protected the slaves in carrying out the command of their master from being punished for his negligence.

B. For the Contracts of Slaves

In the one case which directly affected the contract of a slave, the principle of no responsibility on the part of the master is in force. The action was to recover damages for the non-performance of a parole or simple contract. As a claim for not abiding by the terms of the contract, the defendant in the case of *Tilly vs. Norris,*[5] tried in 1844, claimed that he was entitled to a "set off" for the amount of the account of the hirer (intestate of the plaintiff) of the slave for work he had done for the slave in question and for the money he had lent the slave while in his employment. The defendant claimed that the Negro had a general license from his master to make contracts, but the plaintiff gave evidence to show that the intestate used every means to prevent his slaves from acting without his expressed authority and that he threatened to sue those employing them without his permission. A verdict was given for the plaintiff in the Superior Court of New Hanover County, but on appeal Justice Daniels held that a master could be made liable for the work done for his slave and money lent to his slave. It was further held that a general license to slaves from their master to make bargains for work to be done only for the benefit of the slaves, or a license for the slave to borrow money on his own account, would not render the master a debtor to the person who should be so injudicious as to run up an account with the slave in possession of the license.

The opinion in the above case, together with the decision in the case which is to follow, shows how the master was protected against the indiscreet whites and the ignorant blacks. The case of *Carter vs. Streator*[6] was brought before the Court

[5] 4 Ired. 229.
[6] 4 Jones 62.

in 1856. The proof was that the plaintiff had hired himself and his slave out by the day and that while the slave was so hired, the defendant took possession of him. The defendant claimed that by the contract between himself and the plaintiff for the employment of the plaintiff's time, along with that of the slave, the possession of the slave was vested in him during the time for which the slave was hired to him, the plaintiff's right being only reversionary, for an injury to which "case" and not "trespass" was the proper remedy.[7] The action of trespass had been brought for the seizing and selling of the slave. The defendant also proved that two months after the seizure the slave was sick and unable to work, and insisted that it should go in mitigation of damages.

Justice Manly, in giving the opinion of the Court, held that, where one agrees to work with his own slave by the day, the employer is given no interest in the slave to entitle him to bring an action or to deprive the owner of an action for taking away the slave while so employed. Neither could the defendant, for the purpose of diminishing the damages, avail himself of anything which lessened the value of the property while in his wrongful possession. The case means simply that the owner was to be protected in his property rights.

IX

THE HARBORING OF SLAVES

In 1815 a construction was put on the word harboring which governed all later cases involving the harboring of slaves. The word was at this time declared to mean the *fraudulent concealment,* and whenever it was found by the Court, as the proof came from a lower court, that a person fraudulently concealed a slave, he was held subject to the penalty laid down in the act of 1791 which provided punishment for the harboring of slaves.

The case which gave this construction was that of *Dark vs. Marsh.*[1] A Negro slave and child left the home of the plaintiff one night and on the next morning they were in possession of the defendant, who at that time gave notice to the plaintiff of

[7] These technical forms of actions were later done away with by a revision of the constitution in 1868.

[1] 2 Car. Law. Repos. 249.

the fact and maintained his right to them as slaves which had belonged to his father. The plaintiff, however, proved title under a bill of sale, and possession till they left him. The defendant, on the other hand, held the slaves in an open and avowed manner. The act of 1791 imposed a penalty where any person should "harbor or maintain under any pretense whatever any runaway slave or servant." By the construction put on the word harboring, namely, fraudulent concealment, the judgment for the defendant by the lower court was upheld by the Supreme Court. The decision was confirmed by Justice Gaston in 1837[2] when he said that it was a settled rule of the Supreme Court to affirm every judgment not found to be erroneous and, therefore, the construction put on the act of 1791 in the case of *Dark vs. Marsh* should stand.

In 1838 the defendant in the case of *State vs. Hathaway*[3] was tried for "secretly, clandestinely, and fraudulently" harboring and maintaining a runaway slave and was found guilty before Judge Pearson in Edgecombe Superior Court. Evidence was offered to the jury to show that the slave had one or more places of concealment on the land of the defendant, and the declarations of the defendant had been that he would not take the slave up because of the confidence which the slave had shown in him. Justice Daniels upheld Judge Pearson in his decree that harboring or maintaining a runaway slave consisted in secretly aiding him by any means to remain absent from his master, knowing at the time of rendering such aid that he was a runaway slave.

That the length of time during which a slave was harbored did not alter the case was clearly brought out in the case of *State vs. Burke*,[4] tried in 1856, in which the defendant was indicted for harboring a runaway slave. Here the slave remained on the place only a few hours. It was found, however, by the jury of the Superior Court of Chowan County, that the defendant was guilty of fraudently concealing the slave and a verdict was given for the State. True to the case of *Dark vs. Marsh,* the verdict was upheld by the Supreme Court, Justice Battle presiding.

---

[2] *Thomas vs. Alexander,* 2 Dev. & Bat., 385.
[3] 3 Dev. & Bat. 125.
[4] 4 Jones 7.

The liberal policy of the Court is clearly brought out in the case of *Young vs. McDaniel*[5] in 1857. The evidence in this case was as follows: The defendant went with the slave in question "to one of the most public places in the western part of the State," the railway station in Salisbury, and told the ticket agent that the slave was the property of the plaintiff and that said slave was on his way to see his wife who was in the State of South Carolina. The agent handed the defendant a ticket to Charlotte for the slave. The defendant then remarked to the slave, in the presence of the agent, that they would go to the livery and camp. While at the livery he told the proprietor of the livery that the plaintiff was owner of the slave, and where he was going. Later he told the plaintiff what he had done. Chief Justice Nash in giving the opinion of the Court held that no action could be brought against the defendant because his acts were not secretly committed.

Such a construction enabled a slave to leave the State without any chance of being returned, and the master lost his property without being in any way compensated. When it is remembered that the Court was very strict in the matter of emancipation, so that the free Negro class might not be increased, it seems erratic that the Court should in a case concerning the harboring of slaves be so liberal as to make an escape into another state possible. Also, those who harbored the slaves in secret were generally those who held them in a quasi-slavery state, for only an act of kindness or some favor, such as aid to escape from bondage, would cause a slave to leave his master to live with another. Probably the fact that the slave would be aided in leaving the State and thereby prevent a possible increase of the free Negro class explains the liberal view of the Court. That the Legislature, however, considered the concealing of a slave with the intent to remove him from the State a serious offense is brought out in the act of 1837, which imposed the death penalty.[6]

[5] 5 Jones 103.
[6] Rev. Code, 1837, ch. 34, sec. 11.

X

INDICTABLE OFFENSES

A. Trading with Slaves

Very stringent restrictions were from time to time placed on the whites in regard to trading with slaves, and when these cases came before the Supreme Court the letter of the law was strictly enforced. Such a policy was adopted because of the incentive to stealing which trading gave to the slave. By the act of 1850[1] trading at night and on Sunday was unlawful, with one exception. Liquor could be secured by a written permission specifying the amount to be bought or sold.[2]

A case coming under the above act was before the court in 1853. It was that of *State vs. McNair*[3] in which the defendant was charged with the unlawful delivery of liquor to a slave. The order from the overseer of the slave was as follows: "Mr. McNair, you will please to send to me five quarts of whisky, by boy Jerry," signed "James H. Higgs." McNair was found guilty of unlawful trading before the Superior Court, and appealed. Chief Justice Nash held that there was no evidence, as alleged in the indictment, that the liquor was not for the overseer, and the judgment of the lower court was reversed.

The decision in the case of *State vs. Hyman and Austin*,[4] tried in 1853, differed from that in the above case in that there was an order to the defendant "to sell and deliver" to his slave "ardent spirits whenever he shall call for the same during the year." Chief Justice Nash held that since the order did not specify the quantity of the article or the exact article to be purchased, and since the order to be lawful must be limited to the sale and delivery for a specified day, the generality of the order would defeat the statute by permitting trading at night and on Sunday. The judgment of the lower court being "guilty of unlawful trading," it was upheld by the Supreme Court.

Where liquor was not involved the cases came under other acts, which were as strictly interpreted. In 1844 Chief Justice Ruffin held that a person buying from or selling to a slave was

[1] Rev. Code, ch. 34, sec. 84.
[2] Ibid., sec. 87.
[3] 1 Jones 180.
[4] *Ibid.*, 59.

indictable on his own account unless the permission was in writing. Here he was simply upholding an act of the legislature.[5] The evidence was that the defendant sold a quart of liquor to a slave of one Kee for a bag of cotton, without knowing that the master gave to the slave the right to trade the cotton.[6] In the trial before Judge Pearson of the lower court, the defendant claimed that the judgment should be arrested because of an indictment charging selling to the slave and by the slave being joined in the same count. Ruffin did not let himself be diverted from the law by such a claim, for he held that the defendant went to trial under duplicity of indictment and must, therefore, be bound by the results. Furthermore, indictments were not quashed or judgment stayed because of formal objections.[7]

In 1864 Justice Manly had a clear case of the violation of the law brought before him for judgment. In the case of *State vs. Honeycutt*,[8] the indictment was for the buying and receiving corn from a slave. The evidence on which the defendant was found guilty of unlawfully trading with the slave was in brief as follows: The master, suspecting the slave of trading, secretly followed him at night to the home of the defendant, saw him signal the defendant from his house by throwing small stones on the roof, and then make the trade. The defendant put in a plea of not guilty because of the presence of the master. Justice Manly held that the presence of the master without either the slave or the defendant knowing of his presence, would not alter the case. The instrument necessary to make the trading lawful was not produced; no written permission was in evidence, and in such a case one was indictable.

B. Playing Cards

In 1830 an act was passed which made it unlawful for any white person, free Negro or mulatto to play at any game of cards with slaves. By the act of 1850 it was unlawful for a white man to play at a game of cards, or any game of chance, hazard or skill, with any slave or free person.[9] The nature of

[5] Rev. Code, ch. 34, secs. 85, 87.
[6] 4 Ired. 246.
[7] Rev. Code, ch. 35, sec. 14.
[8] 1 Winston 446.
[9] Rev. Code, ch. 34, sec. 116.

such acts indicates the trend of the legislature and the Court remained true to the principle of a strict enforcement of the law in cases involving the institution of slavery.

In 1829 a case came before the Court prior to the act making a white man's playing cards with a slave an indictable offense. It was that of *State vs. Smith*[10] in which the defendant was indicted for "unlawfully playing cards with slaves to the evil example of others in like cases offending." There was a verdict for the State before Judge Strange from Anson, but the judgment was arrested. It was held to be no offense either at common law or by statute to gamble with a slave. The solicitor appealed, but the judgment of the lower court was affirmed by the Supreme Court.

The case of *State vs. Ritchie*,[11] tried in 1836, came under the act of 1830. The defendant was indicted for playing cards with two slaves. He was found guilty in the lower court and judgment was pronounced by Judge Dick. The defendant then appealed, his counsel claiming that he could not be convicted because the name of the game of cards was not mentioned in the indictment. Justice Daniels held that it was not necessary to specify the particular game of cards, and the judgment was affirmed.

C. The Stealing of a Slave

The last two cases to be taken up are important because of the Justice who decided them. The first case brings out the point that the Court was strict in its decisions concerning slavery as an institution, but was liberal in protecting the personal rights of a slave. This was the case of *State vs. Jernigan*.[12] The defendant was indicted for stealing a slave and was found guilty under the act of 1779. The case was brought before the Circuit Court in 1819. The defendant appealed to the Supreme Court on the ground that the words used in the indictment were not those specified in the statute, and he would, therefore, be entitled to benefit of clergy. Chief Justice Ruffin held that the statute provided that any person guilty of stealing or taking by any means the slave of another "with an intent to sell or dispose of it to another or to appropriate to their own

[10] 2 Dev. 281.
[11] 2 Dev. & Bat. 29.
[12] 3 Murphy 12.

use," should suffer death without benefit of clergy, and that one found guilty of stealing on an indictment which did not give expression to the above intent, as described in the act, would not be given benefit of clergy.

The case of *State vs. Boyce*[13] was brought before the Supreme Court in 1849, in which the defendant was charged with keeping a disorderly house. The proof of the case was, in brief, as follows: The defendant had permitted his slaves to meet and dance on his premises on Christmas eve and other holidays. Other slaves, with the permission of their masters, joined in the dance, and some of the white children joined in the dance with the slaves. Chief Justice Ruffin held that the above act would not constitute the offense of a disorderly house. In giving his opinion he said: "It would be a source of regret if it were to be denied to slaves, in the intervals between their toils, to indulge in mirthful pastime . . . without hurt to anyone, unless it be that one feels aggrieved that these poor people for a short space be happy at finding the authority of the master give place to his benignity and at being freed from care and filled with gladness." With the reading of these words as they were spoken by one who believed in strict enforcement of the law, we have the fact again impressed upon our minds that the rights of slaves as human beings, were, in general, considered by those human beings who had them under their submission. Such a principle must have done much to ameliorate and make more tolerable the status of slavery.

CONCLUSION

It is evident that the institution of slavery was very complex. There was litigation on many points and principles. A review of the decisions of the Supreme Court as a whole warrants the following conclusions:

First, slaves were held to be personalty rather than real property. This was established in *Nixon vs. Lindsay*,[1] which was a proceeding for partition, tried in 1855, as it was also clearly shown by the cases discussed in the chapter on "The Sale of Slaves." These were cases concerning personalty.

[13] 10 Ired. 536.
[1] 55 N. C. 230.

Second, regarding the protection of the slave from absolute control of the master, there were two periods, separated by the decade 1823-1833. In the earlier period there was marked uncertainty as to the law governing acts committed upon the person of slaves. In 1801 (*State vs. Boon*) it was clearly shown that doubt existed as to whether or not one could be found guilty of murder for the killing of a slave under the rules of the common law. Likewise, the hopeless uncertainty of the act of 1791 was pointed out, though this uncertainty was remedied by the act of 1817. In 1823 it was held (in *State vs. Reed)* that under the rules of the common law the killing of a slave might be murder, and that "absolute control" meant over *services* but not over *life*. This opinion was handed down by Justice Henderson. But in 1829 we find Justice Ruffin (in *State vs. Mann)* sticking to the letter of the law and going back to the "uncontrolled authority over the *body*." Then, in 1834, in the case of *State vs. Will,* with Justice Gaston writing the opinion, it was held that a slave had the right to *defend* himself against the unlawful attempt of the master to deprive him of his life, thereby going back to the decision in *State vs. Reed* (1823), that the master did not have absolute authority, and overruling the case of *State vs. Mann* (1829), which held the opposite from *State vs. Reed,* while in 1839 *(State vs. Hoover)* the same humane decision was upheld. In 1855 *(State vs. Robbins*) the court went still further and held that a *master* would be guilty of murder if a slave died as a result of blows from a deadly weapon where the offense of the slave was slight and there was not sufficient provocation to reduce the crime to manslaughter. This opinion was rendered by Justice Battle. So we see that while virtually the same opinion held in *State vs. Will* had been held eleven years earlier in the case of *State vs. Reed,* the case of *State vs. Will* was the land-mark for protection of the slave. After that case was decided there was no going back, but, rather, we find more liberal opinions and a pronounced willingness on the part of the Court to assert a humane attitude. This fact is also brought out in the trials of slaves for their acts committed upon whites. These decisions were handed down in 1840, 1849 and 1857.[2] The

[2] Boyd, *History of North Carolina,* 1783-1861, p. 204.

change, then, must have been largely due to the personnel of the Court and members of the Bar, for the cases cited in this paragraph dealt with the interpretation of the law.

Concerning slaves as property, little more can be added to what has been said along with the cases discussed. These cases, as has been pointed out, affected the institution of slavery and showed the trend of the Court in a very indirect and slight manner. Under the transfer of slaves through sales and gifts, there were four cases to come before the Court before 1830, while there were nineteen after 1830. It can hardly be said, as one might expect, that those decided after 1830 were more complex than those before that date, for while some were more complex than those before 1830 others decided after 1850 were more simple in nature. They involved new points of law and came about under new and different circumstances. Probably the increase in the number of cases coming before the Court after 1830 was due to the increase in the value of the slave as time went on. In 1790 the value of slaves was approximately $150 to $200 per head, while $544 per head was the value given by the first state report on slave values.[3] Such would certainly be some inducement to contest the ownership of slaves.

[3] Boyd, *History of North Carolina,* 1783-1861.

APPENDIX

Cases Reported

I. Offences Against the Person of Slaves

State v. Boon..... 1 N. C. 103
State v. Tackett..... 1 Hawks 210
State v. Reed..... 2 Hawks 154
State v. Mann..... 2 Dev. 263
State v. Hale..... 2 Hawks 582
State v. Will..... 1 Dev. & Bat. 121
State v. Hoover..... 4 Dev. & Bat. 500
State v. Robbins..... 3 Jones 249

II. Offences by Slaves

State v. Jarrott..... 1 Ired. 76
State v. Caesar..... 9 Ired. 391
State v. David..... 4 Jones 353
State v. Jesse..... 2 Dev. & Bat. 297
State v. Woodman..... 3 Hawks 384
State v. Tom..... Busbee 214
Anonymous..... 8 Jones 19
Anonymous..... 7 Jones 68
State v. Clarissa..... 5 Ired. 221
State v. Nat.....13 Ired. 157
State v. Ben..... 1 Hawks 434
State v. Adam..... 3 Hawks 188
State v. Allen..... 3 Hawks 614
State v. Bill.....13 Ired. 373
State v. Ned..... 6 Jones 67

III. Suits for Freedom

Evans v. Kennedy..... 1 Haywood 423 (487)
Garber v. Garber..... 2 Haywood 127 (289)
Anonymous..... 2 Haywood 345 (528)
Bryan v. Wadsworth..... 1 Dev. & Bat. 384
Sampson v. Burgwin..... 3 Dev. & Bat. 21
Campbell v. Street..... 1 Ired. & Bat. 109
Mayho v. Sears..... 3 Ired. 224
Culley v. Jones..... 9 Ired. 168
Stringer v. Burcham.....12 Ired. 41
Bookfield v. Stanton..... 6 Jones 156
Jarman v. Humphrey..... 6 Jones 28

IV. Manumission

Anonymous..... 2 Haywood 134 (303)
Pride v. Pullian..... 4 Hawks 49
Sevens v. Ely..... 1 Dev. 497

Contentnea Soc. v. Dick..... 1 Dev. 189
Lemmond v. Peoples..... 6 Ired. Eq. 137
Green v. Lane..... 8 Ired. Eq. 70
Campbell v. Smith..... 1 Jones Eq. 156
Redding v. Jones..... 4 Jones 216

V. THE SALE OF SLAVES

Knight v. Thomas..... 1 Haywood 289
Rhodes v. Holmes..... 2 Hawks 194
Cutler v. Spillar..... 2 Haywood 61
Bateman v. Bateman.....11 Mur. 97
Governor v. Howard..... 1 Mur. 168
Cummings v. MacGill.....11 Mur. 357
Mushat v. Brevart..... 4 Dev. 73
Caldwell v. Smith..... 4 Dev. & Bat. 193
White v. White..... 4 Ired. 563
Woods v. Fuller..... 5 Ired. 26
Huntley v. Ratliff..... 5 Ired. 542
Smith v. Davis..... 8 Ired. 508
West v. Tilgman..... 9 Ired. 163
Featherstone v. Featherstone....11 Ired. 317
Osborne v. Horner.....11 Ired. 359
Benton v. Saunders..... Busbee 360
Morris v. Rippy..... 4 Jones 533
Brown v. Brooks..... 7 Jones 93
Eure v. Parker..... 7 Jones 424
Bailey v. Moore..... 1 Winston 86

VI. GIFTS OF SLAVES

Cotton v. Powell..... 2 Car. Law Rep. 431 (313)
Atkinson v. Clarke..... 3 Dev. 171
Cobb v. Hines..... Busbee 350
McLein v. Nelson..... 1 Jones 396
Reeves v. Edwards..... 2 Jones 457
Cox v. Humphrey..... 6 Jones 405

VII. CONCERNING THE INCREASE OF SLAVES

Tims v. Potter..... 1 N. C. 8
Glasgow v. Flowers..... 1 Haywood 234
Erwin v. Kilpatric..... 3 Hawks 456
Patterson v. High..... 8 Ired. 52

VIII. THE MASTER'S LIABILITIES

Campbell v. Staiert..... 2 Murphy 309
Parham v. Blackwell..... 8 Ired. 446
Garrett v. Freeman..... 5 Jones 78
Tilly v. Noriss..... 4 Ired. 229
Carter v. Streator..... 4 Jones 62

IX. THE HARBORING OF SLAVES

Dark v. Marsh..... 2 Car. Law Rep. 249
Thomas v. Alexander..... 2 Dev. & Bat. 385
State v. Hathaway..... 3 Dev. & Bat. 125
State v. Burke..... 4 Jones 7
Young v. McDaniel..... 5 Jones 103

X. INDICTABLE OFFENCES

State v. McNair..... 1 Jones 180
Hyman v. Austin..... 1 Jones 59
State v. Honeycutt..... 1 Winston 446
State v. Smith..... 2 Dev. 281
State v. Jernigan..... 3 Murphy 12
State v. Boyce.....10 Ired. 536